IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. ....

76-1547

SAMUEL H. SLOAN and SAMUEL H. SLOAN
d/b/a SAMUEL H. SLOAN & CO.,
Petitioners,

-against-

SECURITIES & EXCHANGE COMMISSION, RAY GARRETT, JR., PHILIP A. LOOMIS, JR., JOHN R. EVANS, A. A. SOMMER, JR., and GEORGE A. FITZSIMMONS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit dated November 18, 1976 which (1) affirmed the order of the Securities and Exchange Commission dated April 28, 1975 which revoked the broker dealer registration of Samuel H. Sloan & Co. and barred Samuel H. Sloan from being associated with any broker or dealer and (2) declared the first of a series of orders of the Securities & Exchange Commission suspending trading in the stock of Canadian Javelin Ltd. to be valid.

OPINIONS BELOW

The decision by the Administrative Law Judge of the Securities & Exchange Commission dated July 31, 1972 which denied a motion for a more definite statement was

not reported and is included as Appendix B to this petition. The Initial Decision of the Administrative Law Judge of the Securities & Exchange Commission dated April 25, 1973 to revoke the broker dealer registration of Samuel H. Sloan & Co. and to bar Samuel H. Sloan from being associated with any broker or dealer was not reported and is included as Appendix D to this petition. The final decision of the Securities & Exchange Commission dated April 28, 1975 to revoke the broker dealer registration of Samuel H. Sloan & Co. and to bar Samuel H. Sloan from being associated with any broker or dealer was reported as *Samuel H. Sloan*, 6 S.E.C. Docket 772, Securiites Exchange Act Release No. 11 76 (April 28, 1975) and is included as Appendix E to this petition. The opinion of the United States Court of Appeals for the Second Circuit dated November 18, 1976 which affirmed the order of the Securities & Exchange Commission and which declared invalid a series of orders, except for the first order, suspending trading in the stock of Canadian Javelin Ltd. is reported as *Sloan v. S.E.C.*, 547 F.2d 152 (2d Cir. 1976) and is included as Appendix G to this petition. An opinion dated December 27, 1976 which was docketed on January 24, 1977 and which amended the opinion of the Court of Appeals dated November 18, 1976 is included as Appendix H to this petition. Copies of two orders dated January 24, 1977 which denied petitions for a rehearing and suggestions that the rehearing be en banc are included as Appendix I and Appendix J to this petition.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The opinion of the United States Court of Appeals for the Second Circuit, which disposed of two previously unconsolidated cases dealing with (1) broker dealer registration and (2) trading suspensions, was dated November 18, 1976. Both parties then filed petitions for a rehearing and suggestions that the rehearing be en banc.

No action was taken on these petitions until January 24, 1977 when orders were entered denying suggestions that the rehearing be in banc and a Per Curiam opinion was entered dated December 27, 1976 amending the opinion of November 18, 1976. The time within which to petition this Court for a writ of certiorari starts on January 24, 1977 and runs for 90 days thereafter.[1] This time was extended until May 15, 1977 by order of Mr. Justice Marshall.

QUESTIONS PRESENTED

1. Was the Court of Appeals in error in ruling that the entry of an injunction is in itself sufficient grounds to support the revocation of a broker dealer registration under §15(b)(5)(C) of the Securities Exchange Act of 1934?

2. Are the findings of the Securities & Exchange Commission supported by substantial evidence?

3. Was the lifetime bar imposed upon Samuel H. Sloan a penalty more severe than that permitted by statute?

4. In this case, in which the broker dealer registration of Samuel H. Sloan & Co. was revoked and Samuel H. Sloan

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1. Due to the fact that the Per Curiam opinion amending the November 18, 1976 opinion was backdated to December 27, 1976, the Acting Solicitor General filed a motion for an extention of time to May 26, 1977 to file a petition for a writ of certiorari in this case. Part of the reason given for filing this motion was "to avoid any problems with regard to the timeliness of a petition." See Motion of the Acting Solicitor General p. 2. However, the December 27, 1976 opinion appears to resolve only the petition for rehearing filed by the S.E.C. and not the petition for rehearing filed by this petitioner, which presumably continued to be pending. In any event, in order to avoid any uncertainty regarding this situation, this petitioner consulted the Deputy Clerk of the United States Court of Appeals, Mr. Vincent A. Carlin, who advised the petitioner that the time within which to petition for a writ of certiorari began to run on January 24, 1977. This is clearly correct since the December 27, 1976 opinion was not docketed and was not made available to the parties and to the public until January 24, 1977. See e.g. New York Law Journal, January 25, 1977, p. 1, cols. 4-5, which reported:

> "The three judges who made the original ruling on November 18, 1976, in *Sloan v. SEC*, 75-4087, yesterday denied a petition for a rehearing and the courts' nine active judges denied a petition for a rehearing en banc."

was barred for life from being associated with any broker or dealer, wer the penalties imposed too severe, particularly in view of the weak evidentiary support for the findings of fact, the inordinately long time in which this proceeding has been pending and the tremendous disparity between the sanctions invoked against petitioners in this case and those invoked by the Securities & Exchange Commission in other similar cases?

5. Do the rules of the Securities & Exchange Commission which require brokers and dealers to maintain books, records and other documents for inspection by investigators of the Securities & Exchange Commission (Rule 17a-3, 17 CFR §240.17a-3), to file various periodic reports with the Securities & Exchange Commission (Rules 17a-5 and 17a-10, 17 CFR §§240.17a-5 and 240.17a-10) and to notify the Securities & Exchange Commission by telegram whenever the net capital rule of the Securities & Exchange Commission has been violated by the broker dealer (Rule 17a-11, 17 CFR §240.17a-11) deprive broker dealers of the rights guaranteed to them by the Fourth and Fifth Amendments to the Constitution?

6. Is the net capital rule of the Securities & Exchange Commission, (Rule 15c3-1, 17 CFR §240.15c3-1) unconstitutionally vague and uncertain and were the petitioners constitutional rights violated by the haphazard methods employed by the various Securities & Exchange Commission investigators in computing the net capital of Samuel H. Sloan & Co.?

7. Was the petitioner deprived of his Fifth Amendment right to notice and a hearing and his Sixth Amendment right to be informed of the nature and the cause of the accusations against him by the three page order for public proceedings which merely recited statutory language and did not state with particularity what Samuel H. Sloan and Samuel H. Sloan & Co. was accused of doing and by the

Securities & Exchange Commission's continuously shifting theories of the prosecution of its case?

8. Did the petitioner have a stautory and constitutional right to withdraw his broker dealer registration, thereby terminating the proceedings against him, and is the broker dealer registration requirement itself unconstitutional?

9. Is the order of the Securities & Exchange Commission revoking the broker dealer registration of Samuel H. Sloan & Co. and barring Samuel H. Sloan for life from being associated with any broker or dealer an unconstitutional bill of attainder?

10. Since the Securities & Exchange Commission made no finding that the petitioner used the means or instrumentalities of interstate commerce or purchased or sold any security, was the Securities & Exchange Commission without jurisdiction to impose santions upon the petitioner?

11. Is the risk of bias in an administrative proceeding such as this too high to be constitutionally tolerable and does an administrative proceeding such as this violate the constitutional principles embodied in Article III Section 1, Article III Section 2 paragraph 3, and Amendments 5, 6, 7, 8, 9 and 10 of the Constitution?

12. Since the Securities & Exchange Commission failed to notify the petitioners in writing of facts or conduct which might warrant the commencement of agency action and did not provide the petitioners the opportunity to demonstrate or achieve compliance with all lawful requirements prior to the commencement of agency proceedings, and since the Securities & Exchange Commission does not deny that petitioners were in compliance with all applicable net capital, bookkeeping and reporting requirements at the time the administrative proceeding was commenced, did the Securities & Exchange Commission violate the Administrative Procedure Act, 5 U.S.C. §558(c), when it

commenced its administrative proceeding against petitioners and must therefore the sanctions invoked against petitioners be vacated?

13. In view of the recent release, pursuant to a Freedom of Information Act request by the petitioner, of certain records and files of the Securities & Exchange Commission which show that according to these records and files a number of violations of the rules of the Securities & Exchange Commission which were "found" by the Commissioners on April 28, 1975 did not in fact occur, should the order of the Securities & Exchange Commission be vacated and/or should this Court take other remedial action?

14. Was there sufficient evidence to justify the decision by the Securities & Exchange Commission to suspend trading in the stock in Canadian Javelin Ltd. for a ten day period from April 29, 1975 through May 8, 1975.

15. Is Section 12(k) of the Securities Exchange Act of 1934, 15 U.S.C. §78l(k), which gives the Securities & Exchange Commission the authority summarily to suspend trading in a security for a period not exceeding ten days, unconstitutional?

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, clause 3 provides:

> The Congress shall have the power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

Article I, Section 9, clause 3 provides:

> No bill of attainder or ex post facto law shall be passed.

Article III, Section 1, in pertinent part, provides:

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior . . .

Article III, Section 2, clause 3 in pertinent part provides:

> The trial of all crimes . . . shall be by jury . . .

Amendment Four, in pertinent part, provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated . . .

Amendment Five, in pertinent part, provides:

> No person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a Grand Jury . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law . . .

Amendment Six, in pertinent part, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation . . .

Amendment Seven, in pertinent part, provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .

Amendment Eight provides:

> Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted.

Amendment Nine provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment Ten provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATUTORY PROVISIONS INVOLVED

The Administrative Procedure Act, 5 U.S.C. §556(d), in pertinent part, provides:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable probative, and substantial evidence. . . .

The Administrative Procedure Act, 5 U.S.C. §558(c), in pertinent part, provides:

> . . . Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before

> the institution of agency proceedings therefor, the licensee has been given—
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

Section 12(k) of the Securities Exchange Act of 1934, 15 U.S.C. §78l(k), provides:

> (k) If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading in any security (other than an exempted security) for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange or otherwise, in securities other than exempted securities, for a period not exceeding ninety days. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in which trading is so suspended.

Section 15(a) and (b) of the Securities Exchange Act of 1934, 15 U.S.C. §78O(a) and (b), at the time of the order of the Securities & Exchange Commission dated April 28, 1975, in pertinent part, provided:

> *Sec. 15.* (a)(1) No broker or dealer (other than one whose business is exclusively intrastate) shall make use of the mails or of any means or instrumentailty of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, unless such broker or dealer is

registered in accordance with subsection (b) of this section.

(2) The Commission may by such rules and regulations or orders as it deems necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions or for specified periods, exempt from paragraph (1) of this subsection any broker or dealer or class of brokers or dealers specified in such rules, regulations, or orders.

(b)(5) The Commission shall, after appropriate notice and opportunity for hearing, by order censure, deny registration to, suspend for a period not exceeding twelve months, or revoke the registration of, any broker or dealer if it finds that such censure, denial, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated—

(C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, or dealer, or as an affiliated person or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(D) has willfully violated any provision of the Securities Act of 1933, or of the Investment Advisers Act of 1940, or of the Investment Company Act of 1940, or of this title, or of any rule or regulation under any of such statutes.

(6) . . . Any registered broker or dealer may, upon such terms and conditions as the Commission may deem necessary in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any registered broker or dealer, or any broker or dealer for whom an application for registration is pending, is no longer in existence or has ceased to do business as a broker or dealer, the Commission shall by order cancel the registration or application of such broker or dealer.

(7) The Commission may, after appropriate notice and opportunity for hearing, by order censure any person, or bar or suspend for a period not exceeding twelve months any person from being associated with a broker or dealer, if the Commission finds that such censure, barring, or suspension is in the public interest and that such person has committed or omitted any act or omission enumerated in clause (A), (D) or (E) of paragraph (5) of this subsection or has been convicted of any offense specified in clause (B) of said paragraph (5) within ten years of the commencement of the proceedings under this paragraph or is enjoined from any action, conduct, or practice specified in clause (C) of said paragraph (5). It shall be unlawful for any person as to whom such an order barring or suspending him from being associated with a broker or dealer is in effect, willfully to become, or to be, associated with a broker or dealer, without the consent of the Commission, and it shall be unlawful for any broker or dealer to permit such a person to become, or remain, a person associated with him, without the consent of the Commission, if such

broker or dealer knew, or in the exercise of reasonable care, should have known, of such order.

Section 15(c)(3) of the Securities Exchange Act of 1934, 15 U.S.C. §78o(c)(3), at all pertinent times, provided:

(c)(3) No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) in contravention of such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest or for the protection of investors to provide safeguards with respect to the financial responsibility and related practices of brokers and dealers including, but not limited to, the acceptance of custody and use of customers' securities, and the carrying and use of customers' deposits or credit balances. Such rules and regulations shall require the maintenance of reserves with respect to customers' deposits or credit balances, as determined by such rules and regulations.

Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78q(a), at all pertinent times, provided:

Sec. 17. (a) Every national securities exchange, every member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, every registered securities association, and every broker or dealer registered pursuant to section 15 of this title, shall make, keep, and preserve for such periods, such accounts, correspondence, memoranda, papers, books, and other records, and make such reports, as the Commission by its rules and regulations may

prescribe as necessary or appropriate in the public interest or for the protection of investors. Such accounts, correspondence, memoranda, papers, books, and other records shall be subject at any time or from time to time to such reasonable periodic, special, or other examinations by examiners or other representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors.

Section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78y(a), provides:

Sec. 25. (a)(1) A person aggrieved by a final order of the Commission entered pursuant to this title may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition praying that the order be modified or set aside in whole or in part.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated by the Commission for that purpose. Thereupon, the Commission shall file in the court the record on which the order complained of is entered, as provided in section 2112 of title 28, United States Code, and the Federal Rules of Appellate Procedure.

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part.

(4) The findings of the Commission as to the

facts, if supported by substantial evidence, are conclusive.

(5) If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there was reasonable ground for failure to adduce it before the Commission, the court may remand the case to the Commission for further proceedings, in whatever manner and on whatever conditions the court considers appropriate. If the case is remanded to the Commission, it shall file in the court a supplemental record containing any new evidence, any further or modified findings, and any new order.

Section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78ff(a), provides:

Sec. 32. (a) Any person who willfully violates any provision of this title, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this title, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeded $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

RULES INVOLVED

Securities & Exchange Commission Rule 15c3-1, 17 CFR §240.15c3-1, in pertinent part, provided:

Reg. §240.15c3-1. (a) No broker or dealer shall permit his aggregate indebtedness to all other persons to exceed 2000 per centum of his net capital, and every broker or dealer shall have the net capital necessary to comply with the following conditions:

(1) If he becomes registered as a broker or dealer on and after August 13, 1971, his aggregate indebtedness to all other persons on and after August 30, 1972 and for 12 months after becoming registered shall not exceed 800 per centum of his net capital, and except as provided for in subparagraphs (a)(3) and (a)(4) hereof, he shall have and maintain net capital of not less than $25,000; and

(2) If he became registered as a broker or dealer before August 13, 1971, and he does not come within the provisions of subparagraph (a)(3) or (a)(4) hereof, he shall have and maintain net capital of not less than $15,000 commencing July 31, 1973, and $25,000 commencing July 31, 1974;

(b)(3) The Commission may, upon written application, exempt from the provisions of this rule, either unconditionally or on specified terms and conditions, any broker or dealer who satisfies the Commission that, because of the special nature of his business, his financial position, and the safeguards he has established for the protection of customers' funds and securities, it is not necessary in the public interest or for the protection of investors to subject the particular broker or dealer to the provisions of this rule.

(c) *Definitions*—For the purpose of this rule:

(1) The term "aggregate indebtedness" shall be deemed to mean the total money liabilities of a broker or dealer arising in connection with any transaction whatsoever, including, among other things: money borrowed; money payable against securities loaned and securities "failed to receive"; the market value of securities borrowed (except for delivery against customers' sales) to the extent to which no equivalent value is paid or credited; customers' free credit balances; credit balances in customers' accounts having short positions in securities; and equities in customers' commodities futures accounts; but excluding

(i) Indebtedness adequately collateralized, as hereinafter defined, by securities or spot commodities owned by the broker or dealer;

(ii) Indebtedness to other brokers or dealers adequately collateralized as hereinafter defined, by securities or spot commodities owned by the broker or dealer;

(iii) Amounts payable against securities loaned which securities are owned by the broker or dealer;

(iv) Amounts payable against securities failed to receive which securities were purchased for the account of, and have not been sold by, the broker or dealer:

(2) The term "net capital" shall be deemed to mean the net worth of a broker or dealer (that is, the excess of total assets over total liabilities), adjusted by

(i) Adding unrealized profits (or deducting unrealized losses) in the accounts of the broker or dealer and, if such broker or dealer is a partnership, adding equities (or deducting deficits) in accounts of partners, as hereinafter defined;

(ii) Deducting fixed assets and assets which cannot be readily converted into cash (less any indebtedness secured thereby) including, among other things, real estate; furniture and fixtures; exchange memberships; prepaid rent, insurance and expenses; good will; organization expenses; all unsecured advances and loans; customers' unsecured notes and accounts; deficits in customers' accounts, except in bona fide cash accounts within the meaning of section 4(c) of Regulation T of the Board of Governors of the Federal Reserve System; and the funds on deposit in a "segregated trust account" in accordance with Rule 27d-1 under the Investment Company Act of 1940, but only to the extent that the amounts on deposit in such segregated trust account exceed the amount of liability reserves established and maintained for refunds of charges required by Sections 27(d) and 27(f) of the Investment Company Act of 1940. Provided, however, that the cash and market value of securities, as reduced by the appropriate percentages provided in subparagraph (C) below, which are deposited with a clearing fund maintained by a clearing corporation or similar department or association of a national securities exchange or registered national securities association using a continuous net settlement system for the clearance and settlement of securities transactions (hereinafter called "clearing agency") need not be deducted under the provisions of this subparagraph. [As amended in Release No. 34-9460 (¶78,491), effective March 6, 1972, 37 F.R. 1474; and Release No. 34-9587 (¶78,759), May 8, 1972, 37 F.R. 9390.]

(iii) Deducting the percentages specified below of the market value of all securities, long and short (except exempted securities) in the capital, proprietary and other accounts of the broker or dealer, including securities loaned to the broker or dealer pursuant to a satisfactory subordination agreement, as hereinafter defined, and if such broker or dealer is a partnership, in the accounts of partners, as hereinafter defined:

(*d*) On [all securities, excluding nonconvertable debt and preferred securities], the deduction shall be 30 per cent; *Provided, however,* That such deduction need not be made in the case of (1) a security which is convertible into or exchangeable for other securities within a period of 30 days, subject to no conditions other than the payment of money, and the other securities into which such security is convertible, or for which it is exchangeable, are short in the accounts of such broker or dealer or partner, or (2) a security which has been called for redemption and which is redemable within 90 days.

(v) Deducting, in the case of a broker or dealer who has open contractual commitments, the respective deductions as specified in subdivision (iii) of this sub paragraph, from the value (which shall be the market value whenever there is a market) of each net long and each net short position contemplated by any existing contractual commitment in the capital, proprietary and other accounts of the broker or dealer and, if such broker or dealer is a partnership, in accounts of partners, as hereinafter defined: *Provided, however,* That this deduction shall not apply to exempted securities, and that the deduction with respect to any individual commitment shall be

reduced by the unrealized profit, in any amount not greater than the deduction provided for in subdivision (iii) of this subparagraph (or increased by the unrealized loss), in such commitment; and that in no event shall an unrealized profit on any closed transactions operate to increase net capital.

(ix) Deducting 10% of the contract price of each item in the securities failed to deliver account which is outstanding 40 to 49 calendar days; deducting 20% of the contract price of each item in the securities failed to deliver account which is outstanding 50 to 59 calendar days; and deducting 30% of the contract price of each item in the securities failed to deliver account which is outstanding 60 or more calendar days.

(8) The term "customer" shall mean every person except the broker or dealer: *provided, however,* that partners who maintain "accounts of partners" as herein defined shall not be deemed to be customers insofar as such accounts are concerned.

Securities & Exchange Commission Rule 17a-3, 17 CFR §240.17a-3, in pertinent part, provided:

Reg. §240.17a-3. (a) Every member of a national securities exchange who transacts a business in securities directly with others than members of a national securities exchange, and every broker or dealer who transacts a business in securities through the medium of any such member, and every broker or dealer registered pursuant to Section 15 of the Securities Exchange Act of 1934, as amended, shall make and keep current the following books and records relating to his business:

(1) Blotters (or other records of original entry)

containing an itemized daily record of all purchases and sales of securities, all receipts and deliveries of securities (including certificate numbers), all receipts and disbursements of cash and all other debits and credits. Such records shall show the account for which each such transaction was effected, the name and amount of securities, the unit and aggregate purchase or sale price (if any), the trade date, and the name or other designation of the person from whom purchased or received or to whom sold or delivered.

(2) Ledgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts.

(3) Ledger accounts (or other records) itemizing separately as to each cash and margin account of every customer and of such member, broker or dealer and partners thereof, all purchases, sales, receipts and deliveries of securities and commodities for such account and all other debits and credits to such account

(4) Ledgers (or other records) reflecting the following:

(A) securities in transfer;

(B) dividends and interest received;

(C) securities borrowed and securities loaned;

(D) monies borrowed and monies loaned (together with a record of the collateral therefor and any substitutions in such collateral);

(E) securities failed to receive and failed to deliver.

(11) A record of the proof of money balances of all ledger accounts in the form of trial balances, and a record of the computation of aggregate

indebtedness and net capital, as of the trial balance date, pursuant to §240. 15c3-1; *Provided, however,* (i) That such computation need not be made by any member, broker or dealer unconditionally exempt from §240.15c3-1 by subparagraph (b)(1) or (b)(3), thereof; and (ii) that any member of an exchange whose members are exempt from §240.15c3-1 by subparagraph (b)(2) thereof shall make a record of the computation of aggregate indebtedness and net capital as of the trial balance date in accordance with the capital rules of at least one of the exchanges therein listed of which he is a member. Such trial balances and computations shall be prepared currently at least once a month.

Securities & Exchange Commission Rule 17a-5, 17CFR §240.17a-5, in pertinent part, provided:

Reg. §240.17a-5. (a) *Filing reports.* (1) This rule shall apply to every member of a national securities exchange who transacts a business in securities directly with or for others than members of a national securities exchange, every broker or dealer (other than a member) who transacts a business in securities through the medium of any member of a national securities exchange, and every broker or dealer registered pursuant to section 15 of the act.

(2) Every member, broker or dealer subject to this rule shall file reports of financial condition containing the information required by Form X-17A-5, as follows: (A) a report shall be filed as of a date within each calendar year, except that (i) the first report of a member, broker or dealer (other than one succeeding to and continuing the business of another member, broker or dealer) shall be as of a date not less than one nor

more than five months after the date on which such member, broker or dealer becomes subject to this rule (in the case of a registered broker or dealer this shall be the date the registration becomes effective) and (ii) a member, broker or dealer succeeding to and continuing the business of another member, broker or dealer need not file a report as of a date in the calendar year in which the succession occurs if the predecessor member, broker or dealer has filed a Form X-17A-5 report in compliance with this rule as of a date in such calendar year; (B) such reports shall be filed not more than 60 days after the date of the report of financial conditions; (C) reports for any two consecutive years shall not be as of dates within four months of each other; and, (D) the member, broker or dealer shall on the date on which a preliminary audit examination commences, if the preliminary audit procedures performed requires a report on Part III of Form X-17A-5, notify in writing the Regional Office of the Commission for the region in which the member, broker or dealer has its principal place of business that such preliminary audit examination has commenced and shall file as required by subparagraph (a)(2), not later than 45 days thereafter, a duplicate original of Part III of Form X-17A-5, signed by an officer, partner or principal, with such Regional Office which shall be deemed confidential.

(3) The reports provided for in this rule shall be filed in duplicate original with the Regional Office of the Commission for the region in which the member, broker or dealer has his or its principal place of business and except as provided for in subparagraph (b)(3) shall be available for examination at the principal office of the member, broker or dealer.

(b) *Nature and Form of Reports.* Each report of financial condition filed pursuant to paragraph (a) of this section shall be prepared and filed in accordance with the following requirements:

(1) The report of a member, broker or dealer shall be certified by a certified public accountant or a public accountant who shall be in fact independent;

(2) Attached to the report shall be an oath or affirmation that, to the best knowledge and belief of the person making such oath or affirmation, (i) the financial statement and supporting schedules are true and correct and (ii) neither the member, broker, or dealer, nor any partner, officer, or director, as the case may be, has any proprietary interest in any account classified solely as that of a customer. The oath or affirmation shall be made before a person duly authorized to administer such oaths or affirmations. If the member, broker, or dealer is a sole proprietorship, the oath or affirmation shall be made by the proprietor; if a partnership, by a general partner; or if a corporation, by a duly authorized officer.

Securities & Exchange Commission Rule 17a-10, 17 CFR §240.17a-10, in pertinent part, provided:

Reg. §240.17a-10. (a) Every member of a national securities exchange and every broker or dealer registered pursuant to Section 15 of the Act shall, not later than 120 days after the close of each calendar year (commencing with the calendar year 1969), file a report of his income and expenses and related financial and other information for such calendar year on Form X-17A-10.

(d) In the event any member, broker, or dealer finds that he cannot file his report for any year

within the time specified in paragraph (a) hereof without undue hardship, he may file with the Commission an application for an extension of time to a specified date which shall not be later than 150 days after the close of the calendar year for which the report is made. The application shall state the reasons for the requested extension and shall contain an agreement to file the report on or before the specified date.

Securities & Exchange Commission Rule 17a-11, 17 CFR §240.17a-11, in pertinent part, provided:

> *Reg. §240.17a-11.* (a) Every broker, dealer or member of a national securities exchange or of a registered securities association, subject to Rule 15c3-1 or to a net capital rule of a national securities exchange or registered securities association, whose net capital at any time is less than the minimum required by any capital rule to which such person is subject, shall:
>
> (1) give telegraphic notice as set forth in paragraph (e) hereof that such person's net capital is less than is required by any such capital rule, identifying the applicable net capital rule or rules. The notice shall be given on the same day that such person's capital becomes less than required by any of the aforesaid rules to which such person is subject; and
>
> (2) within 24 hours thereafter file a report of his financial condition as of the date which required the giving of the notice in subparagraph (a)(1) hereof.
>
> (e) Every notice and report required to be given or filed by this rule shall be given to or filed with the principal office of the Commission in Washington, D.C., with the Regional Office of the Commission for the region in which the member, broker or dealer has his or its principal place of business, and with each national securities exchange and registered securities association of which such person is a member.

STATEMENT OF THE CASE

This is the last of a series of essentially related cases, the others of which were presented to this Court on prior occasions.[2] See (in order of the date of the court of appeals decision) *Sloan v. S.E.C.*, 527 F. 2d 11 (2d Cir. 1975), *cert. denied* 426 U.S. 935 (1976); *S.E.C. v. Sloan*, 538 F.2d 313 (2d Cir. 1976), *cert. denied* Dkt. No. 76-365 (December 13, 1976) (two cases); *Sloan v. S.E.C.*, 535 F.2d 676 (2d Cir. 1976), *cert. denied* Dkt. No. 76-58 (October 12, 1976); *S.E.C. v. Sloan*, 535 F.2d 679 (2d Cir. 1976), *cert. denied* Dkt. No. 76-982 (April 18, 1977).

The litigation between Samuel H. Sloan ("Sloan") and the Securities & Exchange Commission ("S.E.C.") began on June 17, 1971 when the S.E.C. instituted an injunctive action against Sloan and Samuel H. Sloan & Co. ("Sloan & Co.") by filing a complaint in the United States District Court for the Southern District of New York. The complaint alleged violations of S.E.C. Rules 15b1-2, 15c3-1, 17a-3, and 17a-4, 17 CFR §§240.15b1-2, 240.15c3-1, 240.17a-3 and 240.17a-4.[3] On June 21, 1971 the S.E.C. applied for and obtained a temporary restraining order which, *inter alia*, prohibited Sloan and Sloan & Co. from making any purchases and sales of securities. Through this order, the S.E.C. then obtained a freeze on Sloan's bank

2. Although there are actually two cases involved, the Court of Appeals consolidated them in its November 18, 1976 opinion and has been treating them as consolidated ever since. A single petition covering both cases is hereby filed in this Court as permitted by Rule 23(5) of the Supreme Court Rules.

3. Subsequently, the allegation of a violation of Rule 15b1-2 was abandoned by the S.E.C.

account. On June 23, 1971, immediately prior to the commencement of a scheduled hearing in the United States District Court, the S.E.C. offered to lift the freeze on Sloan's bank account if Sloan would "consent" to the entry of a preliminary injunction. Sloan accepted this offer and his "consent" to a preliminary injunction was entered on June 24, 1971.

One of the terms of the preliminary injunction was that Sloan would retain a certified public accountant to prepare a certified financial statement of Sloan & Co. as at June 30, 1971. Since Sloan's accountant, Raymond Leon, who had filed an X-17A-5 report for Sloan & Co. as at January 29, 1971, was unsatisfactory to the S.E.C., the S.E.C. staff personnel handling this matter on June 21, 1971 offered to introduce Sloan to an accountant who would be satisfactory to the S.E.C. Sloan accepted this offer and was introduced to Robert W. Taylor ("Taylor"), an attorney and accountant who was a personal friend of Joseph O. Barton, the then head of the Broker Dealer Inspection Division of the New York Regional Office of the S.E.C. When the matter of the preliminary injunction was discussed on June 23, 1971, William Nortman ("Nortman"), the S.E.C. attorney in charge of this case, said that he would agree to accept a preliminary injunction and abandon his application for the appointment of a temporary receiver if Sloan would stipulate to use Taylor as his accountant. Sloan, through his attorney, Roy L. Weiss ("Weiss"), stipulated to this condition. See Transcript of hearing of June 23, 1971, p. 17.

The preliminary injunction, of course, left the case unresolved but the S.E.C. chose not to bring it to trial for the time being. Meanwhile, Taylor conducted his promised audit of the books of Sloan & Co. and at a meeting at the offices of the S.E.C. on July 28, 1971, with Sloan, Nortman and Weiss present, Taylor revealed that the results of his audit were that as at June 30, 1971 Sloan & Co. had no

customer accounts or customer liabilities and had net capital of $48,770.32, but that Sloan & Co. also had a substantial short and fail to deliver position in the bonds of Management Assistance, Inc., a company then going through reorganization, and after taking haircuts to reflect this and other trading positions, Sloan & Co. had a net capital deficiency of $19,221.90. Taylor also reported that this deficiency would be eliminated entirely if Sloan were able to buy the bonds at current market prices and make delivery so as to cover his short position. At the conclusion of this meeting an agreement was reached whereby Sloan & Co. would not do any business except (1) to buy short positions, (2) to sell long positions, and (3) to receive and deliver securities and to pay checks so as to consummate existing contractual commitments. Nortman represented that this arrangement would be satisfactory to the S.E.C.

Sloan & Co. was never able to buy the Management Assistance, Inc. bonds to cover the short position because in the course of the reorganization almost all of the outstanding bonds had been exchanged pursuant to an exchange offer for common and preferred stock and as a result the bonds which Sloan needed to buy were not available on the market. Because of this, and because of the prohibition on new business while this situation persisted, the financial position of Sloan & Co. became frozen and Sloan himself went to work for another stock brokerage firm. Meanwhile, Sloan & Co. continued to submit monthly trial balances and other financial schedules to the S.E.C.

Eventually, through the passage of time, Sloan & Co. was able to buy back some of the Management Assistance bonds and in other cases the contracting brokers agreed to accept the equivalent amount of common and preferred stock, which were in plentiful supply, and as a result the liabilities of Sloan & Co. gradually became reduced to the point where it could resume normal operations as a broker dealer, as it did in early 1972.

On April 25, 1972, with its injunctive action still dormant, the S.E.C. instituted an administrative proceeding against Sloan and Sloan & Co. The Order for Public Proceeding, see Appendix A, made allegations parralleling those made in the injunction action filed on June 17, 1971 and additionally alleged the entry of a preliminary injunction by consent. (See App. 3a).[4]

The order recited the language of the statute and the rules alleged to have been violated. It stated that Sloan & Co. had violated Rules 17a-3 and 17a-4 "from about January, 1971 to present," that it had violated Rule 15c3-1 "from about January, 1971 to on or about January 31, 1972 with the exception of the month of March, 1971," that it had violated Rule 17a-5 "from on or about October 10, 1970 to May 5, 1971," that it had violated Rule 17a-10 "from on or about April 30, 1971 to on or about December 2, 1971," and that it had violated Rule 17a-11 "from on or about September 15, 1971 to the present." (App. 1a-3a).

Sloan retained Taylor, his S.E.C. appointed accountant, to act as his attorney in this case and Taylor filed a motion for a more definate statement "so as to narrow down the exact time period or events involved with a view of permitting Respondent to properly prepare its defense." This motion was strenuously opposed by the S.E.C. staff and was denied by Administrative Law Judge Ralph Hunter Tracy, who ruled that it was not necessary "for the notice of proceedings to detail and itemize all the particular acts, which together constitute the offense." (App. 6a).

Thereafter, a hearing was held from October 30, 1972 until November 1, 1972. Four witnesses testified for the S.E.C., none for Sloan. The witnesses were Arthur Bruder and Sheldon Kanoff, staff investigators who had examined the books and records of Sloan & Co., Sloan himself, and Joseph Iny, a stock broker with whom Sloan had had

4. Hereafter, such references are to pages of the appendices to this petition.

financial dealings. The transcript of the testimony came to 467 pages and a total of 61 exhibits (including sub-exhibits) were offered into evidence by the S.E.C. No exhibits were offered by Sloan. The record which was ultimately generated came to a total of 1,286 pages.

After the hearing, the S.E.C. filed 73 proposed findings of fact which alleged 63 separate violations of S.E.C. rules. Sloan, through counsel, filed a responsive brief. On April 24, 1973, Judge Tracy rendered an Initial Decision which did not agree with the findings proposed by the S.E.C. staff, but did agree with the conclusions that the broker dealer registration of Sloan & Co. should be revoked and that Sloan should be barred from being associated with any broker or dealer. Sloan then petitioned the S.E.C. for review. This petition was granted and briefs were filed. Thereafter, in an unrelated development, Sloan & Co. voluntarily ceased operations and filed a broker dealer withdrawal request on S.E.C. Form BDW. The S.E.C. did not act on this request and on December 3, 1973 an attorney for the S.E.C. staff wrote a letter to Sloan which stated that "a voluntary broker-dealer withdrawal at this point is unacceptable and clearly represents an attempt to vitiate the integrity of Commission administrative proceedings." (Record p. 1259). As a result Sloan & Co. continued as a broker dealer on an involuntary basis until April 28, 1975 when the SEC finally formally denied Sloan's broker dealer withdrawal request and revoked the broker dealer registration of Sloan & Co. and barred Sloan personally from being associated with any broker or dealer. Review of this order is now sought in this petition for a writ of certiorari.

During the period of nearly two years between the time when Sloan & Co. went out of business and filed a broker dealer withdrawal request and the time when the S.E.C. ultimately acted, Sloan attempted to obtain court vindication of various claims by him that the SEC had acted

improperly and in some cases illegally in the course of its activities. These attempts to obtain court vindication backfired as the SEC obtained two injunctions, dated January 18, 1974 and January 17, 1975, and a suit for declaratory relief filed in the district court and a petition for review of a series of S.E.C. trading suspension orders filed in the Court of Appeals were both dismissed. These court actions were the subject of the cases previously cited. Sloan's appeals from the two injunctions were dismissed *sua sponte* by the court of appeals. Sloan himself was later held in contempt of court and his appeal from the contempt order was dismissed. Then the injunction action in which the contempt proceeding was brought was dismissed as moot and the injunction dated January 17, 1975 was thereby automatically vacated. Thus all that remains outstanding from all of those proceedings is the injunction of January 18, 1974 which was entered after a decision reported as *S.E.C. v. Sloan*, 369 F. Supp. 996 (S.D.N.Y. 1974). However, the outgrowth of these proceedings was that Sloan was ultimately partially successful with one of his claims, namely the claim of illegality and unconstitutionality of the S.E C.'s trading suspension policies. That determination forms the second part of the case presented here for review. Although the court of appeals rejected petitioner's contention that the suspension orders were not supported by substantial evidence and further held that petitioner's argument that a trading suspension is unconstitutional was frivolous, it declared a series of suspension orders except for the first order invalid as violative of the statute. Review of those parts of this decision adverse to the petitioner is sought in this petition for a writ of certiorari. The entire record offered by the S.E.C. in support of the first trading suspension is included as appendix K and appendix L to this petition. Appendix K is the initial trading suspension order and appendix L is an "informational memorandum" with one line deleted, which, according to the S.E.C. demonstrates the factual basis for the trading suspension.

REASONS FOR GRANTING THE WRIT

The case presented here involves questions of national interest and importance. Illustrative of this point is the fact that on November 19, 1976, the decision of the Court of Appeals was reported on the front page of the Wall Street Journal, on the front page of the financial section of the New York Times and in the headlines of the New York Law Journal. In addition, the filing by the S.E.C. of a petition for a rehearing en banc was reported in the Wall Street Journal for December 6, 1976 and the denial of the petitions for a rehearing en banc was reported in the headline of the New York Law Journal for January 25, 1977. Moreover, the decision of the Court of Appeals was published in full text on the front page of the New York Law Journal for Monday, November 22, 1976 and has since been frequently discussed in law review articles and other legal publications.

Although most of the attention of the press has been on those aspects of the decision of the Court of Appeals in which this petitioner prevailed, the issues which the Court of Appeals decided favorably to this petitioner are legally and factually intertwined with those issues in which the S.E.C. prevailed. The following discussion will demonstrate the importance of the legal issues involved in this case. However, initially it should be pointed out that if this Court decides not to review the decision of the Court of Appeals, the validity of S.E.C. procedures with respect to its trading suspension policies will, for practical purposes, have been finally and forever judicially decided without the possibility of further review in this or any other court. This circumstance alone should be sufficient to require plenary review of the decision of the Court of Appeals.

In the 43 years since the passage of the Securities Exchange Act of 1934, there has never been a case decided by

this Court involving a broker dealer revocation proceeding. Yet the importance of these proceedings can hardly be underestimated, affecting as they do the entire securities industry and thereby the national economy. In the case presented here, the petitioner contends, *inter alia*, that the broker dealer registration requirement is unconstitutional under *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 79 (1965) and other cases. However, this position was one of many rejected by the Court of Appeals as "frivolous." 547 F.2d at 155. The repeated use by the Court of Appeals of the term frivolous is unfortunate as it sheds little light on the issues presented. The petitioner further contends that the risk of bias in these administrative proceedings is too high to be constitutionally tolerable, *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) and that in accordance with principles explained in *United States v. Lovett*, 328 U.S. 303, 314-318 (1946) the lifetime bar imposed upon Sloan is an unconstitutional bill of attainder. These contentions were also classified to the Court of Appeals as "frivolous" in spite of their apparent merit. A broker dealer registration revocation, a lifetime bar, and a trading suspension are all legislative acts as defined in *Parents v. Atlantic Coal Line Co.*, 211 U.S. 210, 226 (1908) and yet they inflict punishment without a judicial trial. This is particularly true of a lifetime bar because, as this Court stated in the analogeous case of *Cummings v. Missouri*, 71 U.S. (4 Wall) 277, 321-322 (1866):

> "in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights we are all equal before the law. Any deprivation or suspension of these rights for past conduct is punishment, and can be in no otherwise defined."

Thus, it is apparent from analogeous case law that Sloan has been punished and yet there clearly has been no judicial trial because a judicial trial must be conducted before a judge appointed for life in accordance with Article III, Section I of the Constitution and the right to a trial by jury and the other rights guaranteed by Article III, Section 2, Clause 3 and the Sixth Amendment must be preserved. Although this Court has characterized the functions of an independent administrative agency such as the S.E.C. as "predominantly quasi-judicial and quasi-legislative," *Humphrey's Executor v. United States*, 295 U.S. 602, 624 (1935), thereby coining a term adopted by the S.E.C. itself in this case, (App. 33a n. 23), that still does not give an agency such as the S.E.C. the authority to usurp the functions of either the legislature or the judiciary, as the S.E.C. has done here. Moreover, as a matter of statutory construction a lifetime bar is impermissible. The pertinent words of Section 15(b)(7) of the Securities Exchange Act are as follows:

> "The Commission may . . . by order . . . bar or suspend for a period not exceeding twelve months any person from being associated with any broker or dealer . . . "

Petitioner submits that this wording demonstrates a congressional intent to give the S.E.C. the authority to impose a bar for a maximum period of twelve months. The S.E.C. contends, to the contrary, that the term "bar" implies permanence. However, the S.E.C.'s position is inconsistant with the actions it takes since it often imposes a bar for a period of limited duration. See e.g. *Matter of Edward C. Jaegerman*, 10 S.E.C. Docket 726, 728, Securities Exchange Act Release No. 12905 (October 19, 1976) where a two year bar was imposed. In spite of this, the Court of Appeals agrees with the S.E.C.'s arguments on this point and has recently held that the S.E.C. has the choice of imposing either a permanent bar or a suspension for a period of a maximum of one year. See *Arthur Lipper Corp. v. S.E.C.*, 547 F.2d 171, 185 (2d Cir.

1976) *rehearing en banc denied*, slip op. 2625, 2626 (April 1, 1977) (Oakes J. Dissenting). It is submitted that this view cannot withstand analysis and as a matter of statutory construction should be overruled by this Court.

Turning now to the specific facts of this case, petitioner contends that under the constitutional principles set forth in *Jones v. S.E.C.*, 298 U.S. 1 (1936) as well as under the statutory provisions of § 15(b)(6) of the Securities Exchange Act of 1934, Sloan & Co. had an absolute right to withdraw its broker dealer registration, which would have automatically terminated the proceedings against Sloan and Sloan & Co. The fact that the *Jones* case involved a registration statement concerning securities rather than a broker dealer registration does not diminish its appreciability to the instant case since *Jones* set forth general constitutional principles which clearly apply here.

Petitioner also contends that his Fifth Amendment right to notice and a hearing and his Sixth Amendment right to be informed of the nature and the cause of the accusations against him were violated in this proceeding. A reading of the three page Order for Public Proceedings, Appendix A, readily demonstrates that the Court of Appeals was in error in ruling that the order set forth allegations "with great particularity." 547 F. 2d at 155. This becomes even more evident when one compares the Order with the Initial Decision, Appendix D, and with the Final Decision, Appendix E particularly in view of the S.E.C.'s own statement that its findings were "based upon an independent review of the record" (App. 30a, n. 2). It can be seen from these documents that the theory of prosecution of the S.E.C.'s case was continuously shifting, and in fact it continued to shift when this case was argued before the Court of Appeals. It is especially noteworthy that approximately half of the Final Decision of the S.E.C. deals with events which occurred in 1973, 1974 and 1975 which obviously were not alleged in the Order for Public Proceedings and were not

proven at the hearing because they had not yet occurred. Clearly, Sloan and Sloan & Co. did not know and could not have known that these events and circumstances were forming the basis for the accusations against them until they actually received the Final Decision of April 28, 1975. Consequently, in accordance with principles set forth in cases such as *Re Ruffalo*, 390 U.S. 544, 550 (1968), the severe sanctions invoked by the S.E.C. must be vacated.

On Appeal, the S.E.C. defended its procedure by stating that the events of 1973, 1974 and 1975 were considered only with respect to the matter of sanctions and since, according to the S.E.C., the imposition of sanctions is unreviewable by a Court of Appeals except upon a showing of "abuse of discretion", the S.E.C. could impose sanctions based on facts and circumstances other than those proven at the hearing. However, the underpinnings of this argument were knocked out by the recent opinion of *Arthur Lipper Corp. v. S.E.C., supra*, which held the matter of sanctions to be generally reviewable. (The S.E.C. is certain to seek review of that decision in this court). If the *Arthur Lipper Corp.* decision is correct, then it follows that the facts which form the basis for the sanctions imposed by the S.E.C. must be proven at the hearing and this would mean that the order issued by the S.E.C. here must be vacated.[5] Moreover, even without the benefit of the *Arthur Lipper Corp.* decision the sanctions must be set aside "if the remedy chosen is unwarranted in law or is without justification in fact" *American Power Co. v. S.E.C.*, 329 U.S. 90, 112-113 (1946) and there is no way to determine if the remedy is "without justification in fact" if the S.E.C. is

5. Petitioner believes that the holding in the *Arthur Lipper Corp.* case is in conflict with the court's decision in the instant case because, *inter alia*, the factors which the court cited, including the lengthy delay and the disparity in the sanctions, were equally present here. Petitioner accordingly filed a motion in the Court of Appeals to file an amended petition for rehearing and suggestion that the rehearing be en banc to reflect this development in case law but this motion was denied and his amended petition for rehearing was never distributed to the Court.

going to base its imposition of sanctions on facts not alleged or proven at a hearing, as is the case here.

Even the S.E.C. will have to agree that the Court of Appeals made a glaring misstatement in the law when it said:

> "Each of these injunctions was in itself a sufficient ground to support the revocation of Sloan's broker dealer license under Section 15(b)(6)(c) of the 1934 Act." 547 F. 2d at 155.

This statement is incorrect. It is clear that the reason the Court of Appeals made this error is that the brief of the S.E.C., p. 3 n. 1, which purported to quote the law as it existed at the time of its April 28, 1975 decision, substituted in two key places three little dots for certain words in such a way as to create a misleading impression of what the statute said. The full and correct quotation of the statute would be:

> (5) The Commission shall, after appropriate notice and opportunity for hearing, by order censure, deny registration to, suspend for a period not exceeding twelve months, or revoke the registration of, any broker or dealer if it finds that such censure, denial, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated —
>
> (C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, or dealer, or as an affiliated person or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice

> in connection with any such activity, or in connection with the purchase or sale of any security.
>
> (D) has wilfully violated any provision of the Securities Act of 1933, or of the Investment Advisers or of this chapter, or of any rule or regulation under any of such statutes.

The brief of the S.E.C., however, quoted the law by stating the following:

> "In this regard, Section 15 (b)(5) provided, *inter alia*, that the 'Commission shall . . . suspend for a period not exceeding twelve months, or revoke the registration of, any broker or dealer if it finds . . . that such broker or dealer . . . (C) is permanently or temporarily enjoined by . . . any court of competent jurisdiction . . . from engaging in or continuing any conduct or practice in connection with any . . . [activity as a broker or dealer or] (D) has willfully violated any provision of . . . [Securities Exchange Act or of the rules promulgated by the Commission thereunder.].'

From this it can be seen that the S.E.C., in drafting its brief, placed ". . . " where the law says "after appropriate notice and opportunity for hearing" and at a later point placed ". . . " where the law says "if it finds that such censure, denial, suspension or revocation is in the public interest. . . . "

Once the law is read correctly, it can be seen that an injunction in itself is not sufficient grounds to support the revocation of a broker dealer registration. There are three additional required elements which are (1) notice, (2) the opportunity for a hearing and (3) a finding by the S.E.C. that the revocation is in the public interest. The same three elements are also required for a bar or suspension under Section 15(b)(7) of the Securities Exchange Act. None of these three elements are present in the instant case and

hence the decision of the Court of Appeals must be reversed.

The requirement that there be a finding of public interest has been noted in prior judicial opinions. For instance, in *Jaffee & Co. v. S.E.C.*, 446 F. 2d 387, 394 (2d Cir. 1971) the Court of Appeals stated:

> "Had Jaffee & Co. been afforded adequate notice, it would have had an opportunity, both to take action to lessen the attractiveness of invoking derivative sanctions and to introduce evidence before the hearing examiner tending to show that the use of such sanctions would not have been in the public interest. These opportunities were totally denied by reason of the course adopted in the notice and at the commission's hearing."

The decision of the S.E.C. in the instant case did have a section labeled "public interest". However, nothing discussed in that section was supported by or even alluded to in the 1286 page record of the proceedings before the S.E.C. Therefore, the findings of the S.E.C. regarding "public interest" were not supported by substantial evidence and hence must be set aside and since a finding of public interest is an essential element in an S.E.C. disciplinary proceeding, the orders of the S.E.C. must be vacated in their entirety. However, the Court of Appeals bypassed this entire argument by its erroneous ruling that an injunction *in itself* is a sufficient ground to support the revocation of a broker dealer license.

That section of the S.E.C.'s opinion which dealt with "public interest" was devoted to a discussion of the very injunctions cited in the Court of Appeals opinion and to related court proceedings. The decision of the S.E.C. set forth its version of the terms of a preliminary injunction issued by United States District Judge Robert J. Ward on January 17, 1975 in an action instituted by the S.E.C. on

December 30, 1974 and quoted out of context and in a highly prejudicial way from papers filed by Sloan in the Court of Appeals in a motion for a stay of that injunction and in a prior petition for a writ of mandamus in that case which asked the Court of Appeals to disqualify Judge Ward from proceeding further. (App. 28a-29a). In effect, the S.E.C. held that it was in the "public interest" not to have the authority of the S.E.C. challenged by a person such as Sloan and that Sloan should be barred from the securities business for that reason. However, it is clear from recent decisions of this Court that a delegation to an administrative agency of the broad discretionary authority to decide what is in the "public interest" is unconstitutional. See *FEA v. Algonquin SNG, Inc.* ____ U.S. ____, 49 L. Ed. 2d 49, 58 n. 10 (June 17, 1976). Thus, in view of the manner in which the S.E.C. has exercised authority here, §15(b)(5) and §15(b)(7) of the Securities Exchange Act are unconstitutional.

As it was pointed out previously, Sloan and Sloan & Co. did not have prior notice that either the court filings or the preliminary injunction issued by Judge Ward on January 17, 1975 or the permanent injunction issued by Judge Ward on January 18, 1974 were going to form the basis for the penalties imposed by the S.E.C. on April 28, 1975. The S.E.C. itself demonstrated the importance of these subsequent events by stating in its decision that it gave "weight" to the existence of the second injunctive suit in imposing sanctions (App. 28a) and by stating:

> "Here we have facts and circumstances before us that were unknown to and could not possibly have been foreseen by our staff at the time of the settlement talks [which occurred prior to the hearing in Oct. - Nov. 1972] (App. 34a, n. 24)."

It should be obvious that if the staff of the S.E.C. did not know and "could not have foreseen" the "facts and cir-

cumstances" which formed the basis for the S.E.C.'s imposition of sanctions, then Sloan did not know and could not have foreseen these facts and circumstances either. Had Sloan been afforded adequate notice, he, like the petitioner in *Jaffee & Co. v. S.E.C., supra*, would have had the opportunity to introduce evidence before the Administrative Law Judge and to present legal arguments tending to show that the events of 1973, 1974 and 1975 referred to in the S.E.C.'s opinion did not demonstrate that it was in the public interest to impose sanctions on Sloan and Sloan & Co. The position of the Court of Appeals to the contrary boils down to the bald assertion that any time the S.E.C. obtains an injunction in a United States District Court, even by consent and without the defendant admitting or denying the charges, it can use that injunction as a basis for the imposition of administrative penalties without (1) notice (2) an opportunity for a hearing (3) an independent finding of public interest. This is clearly contrary to the requirements set by Congress in Section 15(b) of the Securities Exchange Act and hence the decision of the Court of Appeals must be reversed.

On the basis of the foregoing it would seem apparent that the decision of the Court of Appeals should be reversed and this case should be remanded to that Court to determine if the findings by the S.E.C. of violations by Sloan and Sloan & Co. of S.E.C. rules and regulations are supported by substantial evidence. However, the S.E.C. has indicated, in a brief in opposition to a petition for a writ of certiorari filed under Docket No. 76-365, that it is prepared to argue that the Court of Appeals did review the evidence and found it to be sufficient. This petitioner regards that view as untenable since the opinion of the Court of Appeals did not mention the term "substantial evidence" although the petitioner devoted 75 pages of his brief to the argument that the evidence was insufficient. Even the S.E.C. admitted that its principal witness, Arthur Burder, "ap-

peared to be confused during the cross examination", brief p. 19, but it argued that the evidence was sufficient to support a finding that Sloan and Sloan & Co. had committed at least some rule violations. In view of this, it seems reasonable to assume that had the Court of Appeals agreed that the evidence was sufficient it would have so stated and the absence of any discussion of the evidence means that either the court believed that it was unnecessary to review the evidence or the Court agreed with petitioner's argument that the evidence was insufficient and rested its decision on the grounds that an injunction is in itself sufficient to support the revocation of a broker dealer registration.

In any event, it can be readily demonstrated that based upon the evidence in the record it could not be found that Sloan and Sloan & Co. wilfully violated any of the rules involved. This can be seen by taking up each of the rules in reverse order as follows:

S.E.C. Rule 17a-11, 17 CFR §240.17a-11, requires a broker dealer to send a telegram to the S.E.C. notifying the S.E.C. of any violation the S.E.C. net capital rule "on the date of the violation." The Order for Public Proceedings alleged that Sloan & Co. violated the rule on September 15, 1971, the date that the rule went into effect. The decision of the S.E.C. later "found" that this violation had occurred (App. 32a, n. 17) although two essential elements of proof were missing. First, the S.E.C. made no effort to prove that Sloan violated the net capital rule on September 15, 1971. Second, the S.E.C. failed to prove that Sloan did not send a telegraphic notice to the S.E.C. on that date or that he "wilfully" failed to do so.

On appeal, the S.E.C. admitted this error and stated that the opinion of the S.E.C. had assumed "arguendo" that Sloan & Co. had not violated the net capital rule from July 28, 1971 until January, 1972. Nevertheless, the S.E.C. argued that Sloan & Co. was required to notify the S.E.C. by telegram of its January, 1972 net capital deficiency and

hence violated Rule 17a-11 by failing to do so. In other words, the S.E.C. argued that Sloan & Co. had not violated Rule 17a-11 on September 15, 1971 as the S.E.C. had found, but that he had violated the rule in January, 1972. The making of this argument provides one of the many examples of the continuously shifting theories of the prosecution of the S.E.C.'s case. In any event, the claim that Sloan violated Rule 17a-11 in January, 1972 has as its underpinnings the finding of the S.E.C. that Sloan & Co. had a net capital deficiency of $718 on January 31, 1972. (App. 26a) But the record shows that this finding was based upon faulty computations by S.E.C. investigator Kanoff of Sloan's net capital. In particular, Kanoff failed to give Sloan & Co. full credit for the market value of certain proprietary securities, principally *Shareholders Excalibure Investments*, an actively traded European mutual fund with over a billion dollars in assets, which Kanoff nevertheless valued at zero. When asked why he valued these securities at zero, Kanoff testified that he did so "as a matter of expediency" (Transcript p. 244) and because his supervisor told him "not to bother" looking it up. (Transcript p. 242). Kanoff also testified that had he given these and certain other similarly treated items their full value rather than zero, Sloan & Co. would have been "right on the button" as far as being in compliance with the S.E.C.'s net capital rule. (Transcript p. 247). In short, it was Kanoff's faulty computation of Sloan's net capital which created an otherwise non-existant violation of the S.E.C.'s net capital rule on January 31, 1972.

At this point it is appropriate to mention that errors of this sort were typical of the computations made by Kanoff as a whole. For example, in the trial balances for July 31 and August 31, 1971, Sloan & Co. was long an item of 200 Voplex Corp. (Transcript p. 213-215, 230-231, 265-266). Kanoff valued this item at zero in spite of a computation submitted to the S.E.C. by Sloan which was available to

Kanoff and which showed Voplex Corp. to be worth $14 per share. Voplex Corp. was listed and traded on the American Stock Exchange but Kanoff still valued its shares at zero apparently because he did not bother to look up the American Stock Exchange prices. Thus, Kanoff's computations for July 31, 1971 and August 31, 1971 were off by at least $2,800. Typical of its attitude towards this case, the S.E.C. has yet to admit that Kanoff was in error and that Voplex Corp. was traded on the American Stock Exchange at $14 per share on the dates in question even though this information is readily available in financial publications.

Similarily, with respect to the August 31, 1971 trial balance, a failure in the S.E.C. photocopy machine caused three security positions worth $1676.25 to be washed out and Kanoff did not include the value of these securities in computing Sloan's net capital. (Compare Record p. 601 with Record p. 607-608). Kanoff, when confronted with this mistake on cross examination, admitted the error. (Transcript p. 232, 233 and 249). While honest human errors of this sort are understandable, it is significant to note that a year later in the trial in the injunction action before Judge Ward, the S.E.C. attorneys offered into evidence the identical capital computations containing the same errors without any explanation that Kanoff had previously admitted under oath that these computations contained mistakes. Judge Ward then proceeded to overrule all attempts by Sloan to show that these computations were wrong and incorporated the results of these computations into his findings of fact.

Of course, these computational errors now seem to be of little moment since the S.E.C. conceeded, for the purposes of the appeal and contrary to the apparent findings of the S.E.C., that Sloan & Co. did not violate the net capital rule on any date starting from July 31, 1971 and continuing through December 31, 1971 since Sloan & Co. was not doing business during this period. However, in view of this

concession it should be noted that the finding of a violation of the net capital rule on January 31, 1972 is predicated not only on the finding of a $718 net capital deficiency on that date but also upon a finding that in January, 1972 Sloan "inserted quotations for various securities in the pink sheets published by the National Quotation Bureau, Inc." (App. 26a). There is no evidence to support this finding and the finding itself is untrue.[6] Since there is no evidence to support this finding it follows that there is insufficient evidence to support a finding of a violation of the net capital rule on January 31, 1972 and from this it follows that there is insufficient evidence to support a finding of a violation of Rule 17a-11 on the same date.

In arguing this point, the petitioner went one step further in the Court of Appeals by pointing out that under Fifth Amendment principles set forth in cases such as *Leary v. United States*, 395 U.S. 6, 16 (1969) a statute or rule requiring that an individual notify the government by telegram that he has violated a criminal statute, is unconstitutional. This argument is clearly correct since a violation of the net capital rule is made criminal by §32(a) of the Securities Exchange Act and hence Rule 17a-11 must be found to be unconstitutional even if the S.E.C. had been able to prove a violation, which it did not do.

6 The S.E.C.'s method of "proving" this finding was to call Sloan as its witness and to ask Sloan under oath whether he submitted quotations to the pink sheets in January, 1972. When Sloan failed to respond affirmatively, the S.E.C. tried to impeach his testimony. This attempt to prove this finding was clearly improper. If the S.E.C. wanted to do so it had only to produce a copy of the pink sheets, which are readily available to the S.E.C. and show a quotation inserted by Sloan in January, 1972. The S.E.C. failed to do so. On a related point, the S.E.C. computations concerning whether Sloan & Co. was in compliance with the net capital rule turned primarily on the valuation of the proprietary securities held by Sloan and Sloan and Co. specialized as a market maker in over-the-counter securities and invariably held a large securities inventory for that reason. Since an error of 10% or less in determining the market value of Sloan's security inventory would make the difference in whether Sloan & Co. was shown to be in or out of compliance with the net capital rule on the dates in question, clearly the S.E.C. was required to produce the pink sheets, the Wall Street Journal, or other sources of security prices in order to demonstrate that its market valuations were correct. Again, the S.E.C. failed to do so.

Turning now to the finding that Sloan & Co. wilfully violated Rule 17a-10, it should be pointed out that the S.E.C. made no effort to prove this violation through testimony at the administrative hearing. The only reference to Rule 17a-10 is the entire record of this proceeding (not counting briefs, decisions and orders) is in an attestation signed by the Deputy Records officer of the S.E.C. This attestation stated that "a report on Form X-17A-10 was filed June 8, 1972 by Samuel H. Sloan d/b/a Samuel H. Sloan & Co. pursuant to the provisions of the Securities Exchange Act of 1934." This statement clearly referred to Sloan's 1972 filing, which is not in issue in this case. Nevertheless, the decision of the S.E.C. states that "respondent says he did not [file an X-17A-10 Report] until December, 1971." (App. 32a, n. 16). In fact, respondent made no such statement. On appeal, the S.E.C. claimed that this statement by respondent (the petitioner here) could be found in his answer. (Brief p. 26). However, the answer filed by the respondent merely stated that the report required by Rule 17a-10 was filed late, without stating when it was filed, and denied "that such late filing was wilfully done so as to violate Section 17(a) of the Exchange Act." (Record p. 694). Under the Administrative Procedure Act, 5 U.S.C. §556 (d), the burden of proof at the administrative hearing was on the S.E.C., since the S.E.C. was the proponent of the order being sought. For the S.E.C. to invoke sanctions under §15(b)(5)(C) and §15(b)(7) of the Securities Exchange Act, it must prove (1) that there was a violation of a rule and (2) that the violation was wilfull. In the case of the allegation of a violation of Rule 17a-10, since the S.E.C. did not make an effort to demonstrate either through testimony or documentary evidence that there was a rule violation, it clearly did not prove that the violation was wilfull. It should also be noted that during the period in question, Sloan employed the services of three certified public accountants, one of which, Taylor, was hand picked by the S.E.C. Each of these accountants prepared for filing a separate X-17A-5 report

at considerable expense to Sloan & Co.[7] Sloan & Co. also submitted trial balances and supporting schedules to the S.E.C. on a monthly basis, although not required by any rule to do so.[8] Since Rule 17a-10 simply requires a one page unaudited statement of income and expenses for each calendar year and since Sloan was submitting far more comprehensive and detailed information to the S.E.C. on a regular basis, it is obvious Sloan simply did not realize that an X-17A-10 report was required in addition to all of the other reports he was submitting and that neither his accountants nor his attorney nor the S.E.C. itself told him about it.[9]

In any event, a violation of Rule 17a-10 is clearly *de minimus.* Knowing what a broker dealer's income and expense was for a calendar year does not help the S.E.C. learn whether its rules have been violated, nor does it serve any regulatory purpose. Although it has been held that Congress may require business entities to keep records and

7. Taylor charged Sloan & Co. $1200 for preparing his financial report as at June 30, 1971. A previous accountant, Martin London, billed Sloan & Co. $650 for preparing an X-17A-5 report as at September 25, 1970.

8. The decision of the S.E.C. states that ultimately the S.E.C. staff obtained "almost all of the trial balances it requested." (App. 31a, n. 10). It also states that Sloan & Co. violated Rule 17a-3 by virtue of the fact that the S.E.C. "staff generally had to make about two or three requests for each trial balance it obtained." (App. 26a). However, it can be seen from reading Rule 17a-3 that although it requires every broker dealer to maintain, among other things, monthly trial balances, see Rule 17a-3(a)(11), it does not require a broker dealer to submit these trial balances along with supporting schedules to the S.E.C. Moreover, since Sloan's office was only about six brocks away from the New York Regional office of the S.E.C., it was a simple matter for an S.E.C. investigator to come to Sloan's office and examine his monthly trial balances and indeed the S.E.C. investigators often did so.

9. It is significant to note that the S.E.C. does not claim that it had previously advised Sloan of any of the rule violations alleged in the Order for Public Proceedings or that it sent the customary warning letter sent in similar cases. See *Economou v. U.S. Dept. of Agriculture,* 494 F.2d 519 (2d Cir. 1974). Indeed, in response to a Freedom of Information Act request discussed infra, the S.E.C. released to Sloan a memorandum dated April 20, 1971 which stated that the commission had instructed the staff "to warn Sloan about the alleged violations." The staff never did so The S.E.C. has recently advised Sloan that this memorandum was releaseo to him unintentionally.

make reports, *United States v. Morton Salt Co.*, 338 U.S. 632, 647-651 (1950), these reports must reasonably be related to a specific purpose. *Shapiro v. United States,* 335 U.S. 1, 32 (1948); *Yakus v. United States,* 321 U.S. 414, 424 (1944); *United States v. Darby,* 312 U.S. 100, 125 (1941). In its brief to the Court of Appeals, the S.E.C. argued that the reports required by Rule 17a-10 are "used by the Commission for statistical purposes necessary in connection with the commission's regulation of broker-dealers." (Brief p. 33). No further information was provided such as why this statistical information was necessary or where it was compiled or published. On this basis, Rule 17a-10 is unconstitutional.

The converse situation is presented with regard to the next rule which the S.E.C. found that Sloan and Sloan & Co. had wilfully violated, namely Rule 17a-5. Rule 17a-5 requires brokers and dealers to file with the S.E.C. comprehensive certified financial statements on a periodic basis. The S.E.C. argues that these reports are necessary because they enable the S.E.C. to determine if the broker dealer is in compliance with the net capital rule, Rule 15c 3-1. This is clearly correct since a report filed on Form X-17A-5 must state specifically whether or not the broker dealer is in compliance with the net capital rule and if there is a net capital violation, the exact amount of the net capital deficiency.

As was noted in the discussion concerning the alleged Rule 17a-11 violation, a violation of the net capital rule is criminal inasmuch as it constitutes violation of Section 15(c)(3) of the Securities Exchange Act. Under §32(a) of the Securities Exchange Act, any person convicted of a violation of any provision of the Securities Exchange Act or any rule or regulation thereunder shall be fined not more than $10,000 or imprisoned not more than two years or both. Therefore, a broker dealer who files an X-17A-5 report which states that he is in violation of the net capital rule is confessing to the federal government that he has committed a serious crime. Consequently, Rule 17a-5 is

unconstitutional under the Fifth Amendment principles set forth in cases such as *Marchetti v. United States*, 390 U.S. 39, 47 (1968); *Grosso v. United States*, 390 U.S. 62, 64 (1968); *Haynes v. United States*, 390 U.S. 85, 96 (1968) and *Leary v. United States*, 395 U.S. 6, 16 (1969).

In spite of the compelling logic to this argument, the Court of Appeals disagreed, ruling that the Securities Exchange Act "is not criminal but clearly regulatory in nature." 547 F.2d at 154. How it reached this conclusion is not explained. The S.E.C. argued to the Court of Appeals that the reports required by Rule 17a-5 and Rule 17a-11 "are not designed to ferret out criminal wrongdoing but . . . to provide a means of determining whether broker dealers are in compliance with the financial responsibility requirements." (Brief p. 32). In other words, the S.E.C. argued that it uses the X-17A-5 and X-17A-11 reports, not to determine if broker dealers are committing a crime, but to determine if they are violating the law. The S.E.C. has no interest in knowing, in the absolute sense, how much capital a broker dealer has. It is only interested in knowing whether or not the broker dealer is in compliance with the net capital rule. Due to the complex provisions of the net capital rule, a broker dealer with a net capital of $10,000,000 can nevertheless have a net capital deficiency whereas a broker dealer with net capital of only $5000 and sometimes even less can be in full compliance with the rule. The reports required by Rule 17a-5 serve only one purpose, and that is to tell the S.E.C. whether the broker dealer is in compliance with the net capital rule. If there is any other purpose, the S.E.C. has yet to state what it is.

With regard to the claim that Sloan & Co. wilfully violated Rule 17a-5, here again the S.E.C.'s case is again weak. The evidence adduced at the hearing by the S.E.C. consisted of the answers to three questions which were propounded when Sloan was testifying as a witness for the S.E.C. The first question was "were you aware that you had to file an X17A5 for 1970?" Sloan answered, "Yes."

The second question was, "Was this report filed on or by January 15, 1971?" Sloan answered, "No." (Transcript p. 334). The third question was, "Why wasn't it filed as of January 15, 1971?" To this question, Sloan gave a lengthy answer which he elaborated on during cross examination.

Sloan's uncontradicted testimony was that he hired an accountant named Martin London of the New York City accounting firm of Lader, Scheps & London, who proceeded to prepare an X-17A-5 report as at September 25, 1970. (Transcript p. 424). However, when Sloan went to file this report, he was told by Lawrence Jaffee, an attorney in the Division of Legal Interpretation of the S.E.C., that the report London had prepared was not acceptable as an X-17A-5 report because, unbeknownst to Sloan at the time he had hired London, London was a partner in a small stock brokerage firm in Long Island and it was the view of the Division of Legal Interpretation of the New York Regional Office of the S.E.C. that any partner or officer of any registered securities broker dealer was not "independent" within the meaning of Rule 17a-5 (b)(1) and therefore could not act as an independent certified public accountant for any other registered securities broker dealer. Based upon this ruling, Jaffee instructed Sloan to prepare a new report not as of a date within the time required for filing an X-17A-5 report but as of the most current date possible. (Transcript p. 385). Sloan did as instructed and subsequently his new accountant, Raymond Leon, filed an X-17A-5 report as of January 29, 1971 which was treated as a 1970 filing.[10] Later, Sloan submitted yet a

10. The Administrative Law Judge stated that the report of financial condition as of January 29, 1971 was treated as a 1971 filing (App. 16a). This was not correct. At the administrative hearing, the attorney representing the S.E.C. stated "there's no allegation that Mr. Sloan has not filed the X-17A-5 report for 1970" (Transcript p. 428) which, in its brief to the Court of Appeals, the S.E.C. explained as meaning that the S.E.C. was instead alleging that Sloan had not filed the X-17A-5 report on time. (Brief p. 27 n. 22). Also, the allegation in the Order for Public Proceedings was that Rule 17a-5 was violated "from on or about October 10, 1970 to March 5, 1971." March 5, 1971 was the date Sloan filed the January 29, 1971 report. Thus it is clear that this report was taken as satisfying the 1970 filing requirement.

third X-17A-5 report, this one reflecting the financial condition of Sloan & Co. as of June 30, 1971, for the purpose of satisfying the 1971 filing requirement.

During the administrative hearing, the S.E.C. seemed to be advancing a new charge, not alleged in the Order for Public Proceedings, that Sloan & Co. had failed to file an X-17A-5 report for 1971. This allegation was based on the assertion that the June 30, 1971 filing was not accepted by the S.E.C. (Incidently, the S.E.C. never notified Sloan that this filing had not been accepted and in fact notified Sloan's accountant that the filing had been accepted (Transcript p. 172-173)). Testimony was taken on the question of who on the staff of the S.E.C. made the decision not to accept the June 30, 1971 report as an X-17A-5 filing and why this decision was made. (Transcript p. 172-174). However, the Administrative Law Judge said that he was unable to see why it was not accepted as an X-17A-5 filing (Transcript p. 173-174) and the S.E.C. did not press its argument further.

Once this background is understood, the finding that Sloan & Co. wilfully violated Rule 17a-5 is not so obvious as the decision of the S.E.C. makes it appear. (App. 32a, n. 16). The threshold question would seem to be whether the S.E.C. acted arbitrarily and capriciously in refusing to accept Sloan's X-17A-5 report as of September 25, 1970. Had the S.E.C. been willing to accept this report, the filing requirement would have been satisfied and the instant case would probably never have come before the courts.[11]

11. The S.E.C. started its investigation of Sloan and Sloan & Co. after receiving a letter from Sloan & Co. which stated that it was unable to file its X-17A-5 report on time. The letter was sent on January 11, 1971 and Bruder, the S.E.C. staff investigator, made his first visit to Sloan's office the next day.

Then, assuming the S.E.C. was correct in refusing to accept Sloan's September 25, 1970 report, the next question is whether Sloan knew or should have known that this report would not be acceptable and whether, as a consequence, he wilfully violated Rule 17a-5. The third question is whether under applicable Fifth Amendment principles, the Government can constitutionally require the filing of an X-17A-5 report which may require a broker dealer to admit criminal wrongdoing. Finally the fourth question is whether, assuming the answer to the first three questions is favorable to the position of the S.E.C., it is appropriate for the S.E.C. to bar Sloan for life from being associated with any broker or dealer because in 1971 he was four months late in filing his X-17A-5 report.[12]

Actually, all of this is of little moment because it can be seen that S.E.C. is not authorized to institute an agency proceeding based merely upon a claim of a late filing of a required financial report. The Administrative Procedure Act, 5 U.S.C. §558(c)(2), requires the agency to give the respondent the "opportunity to demonstrate or achieve compliance with all lawful requirements." With regard to the violations of the financial reporting requirements, the Order for Public Proceedings in this case alleged and the S.E.C. found that the violation of Rule 17a-5 *ended* on March 5, 1971 and the violation of Rule 17a-10 *ended* on December 2, 1971 (App. 2a-3a, App. 32a). The S.E.C.

12. It is worth mentioning that the S.E.C. continued to give Sloan trouble with respect to the matter of X-17A-5 reports. At a later date Sloan submitted an X-17A-5 report prepared by Taylor as of July 31, 1972. The S.E.C. refused to accept this filing, stating that Taylor had appeared as counsel of record in this administrative proceeding and the S.E.C. would not permit the same person to act as both attorney and accountant for a broker dealer. Consequently, Sloan was forced to hire yet a fourth accountant who succeeded in preparing an X-17A-5 report dated December 31, 1972 which proved acceptable to the S.E.C. This, over a period of slightly more than two years, Sloan & Co. had a total of five X-17A-5 reports prepared, of which three were rejected for arbitrary reasons which Sloan could not have anticipated. In view of Sloan's substantial efforts to satisfy the capricious demands of the S.E.C., it can hardly be said that he wilfully violated Rule 17a-5.

commenced its administrative proceeding on April 25, 1972 which was 13 and 4 months respectively after the conclusion of the alleged financial reporting violations. Therefore, the violations of Rule 17a-5 and 17a-10 were non-existant at the time the S.E.C. commenced its agency proceeding against Sloan and Sloan & Co. consequently under 5 U.S.C. §558(c) the sanctions invoked in this case are "unlawful."

The foregoing points have eliminated all but two of the rules which the S.E.C. found that Sloan and Sloan & Co. had violated. The rules which remain are Rule 15c 3-1 (the net capital rule) and Rule 17a-3 (the bookkeeping rule).[13] The entire record generated by the S.E.C. with regard to its claims that Sloan and Sloan & Co. had violated the net capital rule on various dates consisted of handwritten "capital computations" and related documents which had been prepared by Bruder and Kanoff, the two S.E.C. staff investigators who testified at the administrative hearing. These capital computations were put into the record after only a cursory explanation of what they were based upon. On cross examination, Kanoff admitted at several points that his computations contained mistakes. Bruder, however, refused to admit any errors.

Actually, most of Bruder's figures bore no relation to the financial position of Sloan & Co. On direct examination, Bruder was asked nothing more than whether he prepared the figures and what his bottom line conclusion was. No further attempt was made by the S.E.C. to probe into how Bruder arrived at his computations or what was their factual basis. On cross examination, Bruder testified that he prepared his balance sheets for Sloan & Co. partly by taking figures he found somewhere in Sloan's books and records and partly by including in figures which he generated himself. (Transcript p. 57-61). Bruder was not an

13. The Administrative Law Judge found that Sloan and Sloan & Co. had also violated Rule 17a-4. (App. 13a). However, the S.E.C. reversed this finding. (App. 30a, n. 6).

accountant and, as far as the record shows, may not even have been a high school graduate. His testimony on cross examination and an examination of his capital computations shows that he took figures from various assorted places in Sloan's books and records and included them in his rendition of Sloan & Co.'s general ledger trial balance. When doing this put the trial balance he was preparing out of balance, Bruder then looked for other offsetting figures and if he could not find such figures he would create them himself. For example, in his January 18, 1971 trial balance, among those items labeled "non-current assets" Bruder listed "Receipts, Deliveries to customers =$9851.25." On the liabilities side, Bruder listed "receipts, payments a/c customers = $11,010.13." Sloan, incidently, had no customers at this time. Bruder admitted on cross examination that he did not find either of these figures in Sloan's general ledger accounts. (Transcript p. 58-60).

Anyone with an elementary knowledge of bookkeeping principles knows that neither "Receipts, Deliveries to customers" nor "Receipts, payments a/c customers" are a proper general ledger item. Nevertheless, Bruder inserted these partially offsetting figures and then took the $9851.25 figure as a deduction from the net capital of Sloan & Co. Only after this and other equally ill-founded deductions did Bruder arrive at his final figures which purported to show a net capital deficiency for Sloan & Co. in the amount of $28,016.70.

Annexed hereto as Appendix M is Bruder's net capital computation for Sloan & Co. as of January 18, 1971. Any accountant can take one glance at this document and determine that the person who prepared it did not know the first thing about basic accounting and bookkeeping principles. Actually, the original document offered into evidence by the S.E.C. is illegible and Appendix M has been prepared for purposes of this petition with the aid of a magnifying glass. (Even with the use of a magnifying glass an inscription in the lower left hand corner of the original

document remains indecipherable). Appendix M is included by way of illustration since it is typical of the numerous computations introduced into evidence by the S.E.C. which form the underlying basis for the S.E.C.'s decision to bar Sloan for life from being associated with any broker or dealer.

On appeal, the brief for the S.E.C. did not offer a word in defense of the obviously nonsensical computations of Bruder or the admittedly erroneous computations of Kanoff. Instead, the S.E.C. rested its argument on the point that "the capital computations involved were admitted into evidence without any objection being made by Sloan's counsel." (Brief p. 25). However, under 5 U.S.C. §556(d) there was no basis for an objection by Sloan's counsel on the grounds of admissibility. Administrative proceedings such as this one are not bound by the technical rules of evidence but after documents are received in evidence the burden of proof remains on the "proponent of the order" to demonstrate that the documentary evidence has probative value. See *Jacobowitz v. United States*, 424 F.2d 555, 559 (Ct. Claims, 1970). Clearly, capital computations riddled with mistakes, as most of the computations submitted by the S.E.C. admittedly or self evidently were in this case, have no probative value.

Moreover, under 5 U.S.C. §558(c) Sloan should have had the opportunity, prior to the commencement of agency proceedings, to examine the capital computations and to demonstrate that they were wrong. Sloan was not given this opportunity and not only did the S.E.C. not let Sloan and his attorney and accountants examine the capital computations prior to the commencement of the agency proceedings, but the S.E.C. staff vigorously resisted all attempts by Sloan's attorney to force production of these documents and the S.E.C. attorney in charge of its case even wrote a nasty letter to the Administrative Law Judge (Record p. 742) when on August 15, 1972 he ordered their

production (App. 7a-8a). Indeed, at the hearing, Taylor, Sloan's attorney, complained that he still had not been given the computations for January 29, 1971.

Of course, the appropriate time to permit Sloan to see the January 29, 1971 computation was not on October 30, 1972, the first day of the hearing, or even two months before the scheduled hearing. Instead, the S.E.C. should have provided Sloan with a copy of its computations for January 29, 1971 in either January or February, 1971 and should have advised Sloan of its conclusion that Sloan & Co. was in violation of the net capital rule and given Sloan a meaningful opportunity to demonstrate that the figures were incorrect and/or to take corrective action. This point goes to the question of wilfullness. How can the S.E.C. claim that Sloan and Sloan & Co. wilfully violated the net capital rule in early 1971 when the S.E.C. itself, which had access to computations which Sloan did not have, never stated that this occurred until more than a year later? Compare *Buchman v. S.E.C.*, slip. op. 3093, 3103 (2d Cir. April 20, 1977).

The record in this case shows that Sloan had every reason to believe that he was in compliance with the net capital rule. As noted previously, Sloan & Co. filed with the S.E.C. a certified X-17A-5 statement as of January 29, 1971 which had been prepared by Raymond Leon, a certified public accountant. This certified X-17A-5 statement showed Sloan & Co. to have a net capital of $4,529.99 in excess of the S.E.C.'s requirements. *The S.E.C. has never challenged the validity or the accuracy of this filed X-17A-5 report.* Yet it continues to maintain, without a word of explanation, that Sloan & Co. was in violation of the net capital rule on January 29, 1971.

Like the January 18 1971 computation, it can clearly be seen that Bruder's January 29, 1971 computation was wrong. Most of the net capital deficiency he "found" was based upon a deduction of $10,000 which Bruder took from

Sloan's net capital. No logical explanation has ever been given for this deduction. As noted previously, the S.E.C. on appeal did not defend the accuracy of any of the capital computations but merely stated that no objection had been made to their admissibility. Bruder's testimony was that he had deducted the $10,000 as an "unconfirmed gift" from Sloan's mother. He testified that he had not found this item anywhere in the assets of Sloan & Co. (Transcript p. 69), that Sloan's mother did not write to the S.E.C. to say that she had given her son $10,000 (Transcript p. 71), and that consequently Bruder had included the sum of $10,000 as a "liability" of Sloan & Co. (Transcript p. 70). This assertion makes no logical sense. Neither Sloan nor his mother nor the books and records of Sloan & Co. stated that Sloan had received $10,000 from his mother as a gift or otherwise and yet Bruder deducted $10,000 from the net capital of Sloan & Co.

The Administrative Law Judge demonstrated his misunderstanding of the case when he said that Sloan "claimed a $10,000 gift from his mother, which was not supported" (App. 15a). Actually, it was the other way around. Moreover, the Administrative Law Judge's statement that the gift was "not supported" was based on the false testimony by Bruder that Sloan had failed to give him a deposit slip showing a deposit of $10,000. This false testimony occurred when Alan Rashes, the attorney appearing for the S.E.C., asked Bruder a question in preparation to offering a deposit slip dated January 29, 1971 into evidence. Rashes asked Bruder whether Sloan ever gave him a deposit slip, obviously expecting a "yes" answer. (Transcript p. 90). When, to the surprise of Rashes, Bruder gave a "no" answer, Rashes put the deposit slip away leaving the Administrative Law Judge with the false impression that the $10,000 deposit "was not supported." Actually, by introducing the $10,000 deposit slip, Rashes was trying to confuse the issue since this item could not possibly have represented the $10,000 which Sloan supposedly received from his mother at a much earlier date.

A year later, at the trial of the parallel injunctive action, Sloan obtained an order from Judge Ward requiring the S.E.C. to search its records and produce such a deposit slip, if one existed. After making a tremendous protest to Judge Wards order, the S.E.C. produced a deposit slip and an April, 1971 trial balance, both of which had been submitted to the S.E.C. and both of which the S.E.C. had claimed in its proposed findings of fact that it had never received. Sloan then wrote to the S.E.C. and advised that Bruder and Kanoff had now admittedly testified falsely when they said that the deposit slip and the April, 1971 trial balance respectively had never been received by the S.E.C. (Record p. 1255-1256). However, the S.E.C. sidestepped the problem of perjured testimony by its two staff investigators (Transcript p. 90 and p. 102), knowingly induced and left uncorrected by its staff attorneys in charge of the prosecution of its case, when it said that the receipt of these items had "no bearing" on the net capital deficiencies. (App. 31a, n. 8). This was not correct as it can be seen that the S.E.C., in a quick shift of its theory of prosecution of its case, offered Sloan's failure to give Bruder the $10,000 deposit slip as "proof" that Bruder was correct in deducting $10,000 from Sloan's net capital.

Significantly, Kanoff, who was assigned to this matter after Bruder retired from the S.E.C., which occurred shortly after he made his computation as of January 29, 1971, did not deduct the mysterious $10,000 figure when he computed the net capital of Sloan & Co. as of February 26, 1971. He did, however, deduct the sum of $58,175 as a "loan payable" to one Joseph Iny. Iny was a stock broker with whom Sloan had had financial dealings unrelated to his activities as a market maker in over-the-counter securities. The sum of $58,175 was the total amount of money which had changed hands between Sloan and Iny. However, Iny, who testified as a witness for the S.E.C., did not testify that he ever loaned Sloan the sum of $58,175. In fact, he testified, directly to the contrary, that although he "wouldn't question [Sloan's] honestly" he was afraid to put

"too much money in his hands." (Transcript p. 382-383). Iny also testified that he was "satisfied" with the results of his financial dealings with Sloan (Transcript p. 381) although Sloan had "personally offended" him at a later date, (Transcript p. 390).

The record of this proceeding contains documents setting forth details of all of the financial transactions between Sloan and Iny during the pertinent period. An examination of these documents shows that Sloan did not owe Iny $58,175 or any other sum of money on February 26, 1971. Nevertheless, Kanoff arrived at the conclusion that Sloan & Co. had a net capital deficiency of $15,961 after deducting a "loan payable" of $58,175 from Sloan's net capital. There is no factual basis for this deduction and, like the previously discussed deductions, the brief of the S.E.C. did not, obviously because it could not, defend the accuracy or the validity of this deduction.

Thus it can be seen that the S.E.C.'s capital computations for January 18, 1971, January 29, 1971, February 26, 1971, and January 31, 1972 were plainly and, in the latter case, admittedly erroneous and, as noted previously, the S.E.C. now agrees that no violations of the net capital rule occurred on any of the dates from July 30, 1971 through December 31, 1971. That leaves June 30, 1971 as the only other date on which the S.E.C. specifically found a net capital violation.[14] However, due to an anomaly in the

14. The appeal brief for the S.E.C. claims that Sloan himself testified that he was in violation of the net capital rule on July 28, 1971, and that this testimony can be found on pages 409-410 of the transcript. However, on those pages Sloan testified that Taylor told the S.E.C. at the July 28, 1971 meeting that the report Taylor had prepared showed that Sloan & Co. did not have sufficient net capital to do business. As the S.E.C. well knows, the matter discussed at the July 28, 1971 meeting was Taylor's report concerning the net capital of Sloan & Co. as of June 30, 1971. In any event, in urging that there was a violation of the net capital rule on July 28, 1971, the S.E.C. was urging the Court of Appeals to make a finding which the S.E.C. itself did not make. Under § 25(a)(4) of the Securities Exchange Act, the Court of Appeals does not have the authority to make new findings of fact and is only authorized to set aside those findings of fact which are not supported by "substantial evidence."

way in which the S.E.C. computes the net capital of broker dealers, a net capital computation reflects the proprietary securities owned by the broker dealer five business days earlier. In this case, that means that the computation of the net capital of Sloan & Co. as of June 30, 1971 involved a valuation of the securities owned by Sloan & Co. on June 23, 1971, five business days earlier, since any securities bought or sold by Sloan & Co. on or after June 24, 1971 would not reach settlement date until on or after July 1, 1971 and consequently would not be reflected on the June 30, 1971 capital computation. However, the fact is that on June 23, 1971 and the days immediately proceeding, Sloan and Sloan & Co. were prohibited by a temporary restraining order obtained by the S.E.C. from effecting any purchases and sales of securities. Thus, in the normal circumstance, if the net capital of Sloan & Co. had become impaired, the situation could have been rectified by selling the long positions or buying the short positions maintained by Sloan & Co. so as to reduce the 30% haircut to the extent necessary to rectify the capital impairment. However, in this case, Sloan & Co. was prohibited by a district court order from conducting the necessary market operations to rectify any net capital problems that might arise. Consequently, it cannot be found that Sloan and Sloan & Co. wilfully violated the net capital rule on June 30, 1971.

From this point it can further be seen that the net capital rule is unconstitutionally vague and uncertain. Every time the S.E.C. computes net capital, it bases its computation on the market price of the security positions of the broker dealer as they existed five business days earlier. If it happens that during the five days between the trade date and the settlement date, the securities owned by the broker dealer as of the trade date fluctuate the wrong way, the result might be a net capital violation, even though the offending securities were sold as many as four days prior to the date of the computation. For this reason, it is im-

possible for a broker dealer to tell whether a transaction is legal at the time he makes the transaction and hence under cases such as *Connally v. General Construction Co.*, 269 U.S.385, 391 (1926) the net capital rule is unconstitutional.

On appeal, the S.E.C. admitted that "because of market fluctuations it might be difficult for a broker-dealer to know whether he was in compliance with the capital requirements" (Brief p. 29) but argued that this problem would not arise if the broker used "trade date accounting rather than the settlement date accounting used by Sloan & Co." However, "settlement date" accounting is used by virtually all broker-dealers and is required for all broker-dealers who are members of the New York Stock Exchange. Moreover, it was Bruder and Kanoff, not Sloan & Co., who made the decision to use "settlement date" accounting. It was they alone who made the computations which, according to the S.E.C., show that Sloan & Co. was in violation of the net capital rule. Clearly, Sloan & Co. was not in a position to dictate the accounting methods used by Bruder and Kanoff. In addition, the "trade date" accounting method has a variety of other even more serious infirmities which explains the fact that it is virtually never used by broker dealers. Among these is the fact that under the trade date method, all sales of securities become "fails to deliver" five days before the settlement date and this results in an increase in the aggregate indebtedness which automatically results in a reduction in the net capital available to the broker dealer.

The foregoing analysis has been somewhat tedious but it nevertheless has demonstrated that the record does not and could not show that Sloan and Sloan & Co. wilfully violated the net capital rule on any of the dates in question. That leaves only the violation of Rule 17a-3, the bookkeeping rule. A discussion of this alleged violation requires a sentence by sentence analysis of the decision of the S.E.C. which required 37 pages of the petitioner's brief in the

Court of Appeals and which resulted in the conclusion that none of the statements made by the S.E.C. regarding violations of Rule 17a-3 were supported by "substantial evidence". It would not be appropriate to include this analysis in this petition for a writ of certiorari. For this reason, only a few brief points will be made. First, many of the facts found in the S.E.C.'s decision do not constitute recordkeeping violations. For example, the decision states that the S.E.C. staff had to ask two or three times for each trial balance it obtained. (App. 26a). However, regardless of how much this might inconvenience the S.E.C., it does not constitute a violation of Rule 17a-3. Second, many of the S.E.C.'s findings are directly contradicted by the record. For example, the decision states that on January 18, 1971 Sloan "furnished something." (App. 25a). Bruder, however, did not testify that Sloan furnished "something." Instead, he testified that he received from Sloan "something which may have been a trial balance. I'd have to examine it." After examining the document in question, Bruder said that it was "a trial balance as of January 14, 1971." (Transcript p. 26). Thus, Sloan did not furnish "something" but instead furnished a trial balance as of January 14, 1971. Similarity, the decision of the S.E.C. states that Sloan had "no books, per se" and that "all [Sloan] had were debit and credit slips." (App. 25a). To be sure, Kanoff's testimony does support this finding but Kanoff went on to testify that the records Sloan maintained were the usual kind of records one would see in a broker using a computer system. (Transcript p. 204). The decision of the S.E.C. further states that computations of net capital were not prepared as required (App. 25a-26a) but Sloan's uncontradicted testimony in the record was that he had prepared all of the required capital computations and that these capital computations were available in his office any time anyone from the S.E.C. wanted to see them. (Transcript p. 331). Third, although the main thrust of the

S.E.C.'s claim that Sloan violated the bookkeeping rule is derived from Bruder's testimony that certain items "were not properly recorded," were "not kept current" or were not "prepared." Bruder was unable to specify in any more detail than that found in the S.E.C.'s decision which records it was that were not "properly recorded," "kept current" or "prepared." Moreover, the S.E.C. did not offer into evidence originals or copies of any of the records or ledgers which it claims were not properly prepared and the only "evidence" in support of the finding of a violation of the recordkeeping rule was Bruder's extremely hazy recollection of the state of Sloan's records a year and a half earlier. For example, on direct examination, Bruder testified that Sloan & Co. did not maintain a general ledger. (Transcript p. 23). On cross, however, he explained that the general ledger of Sloan & Co. was "not properly maintained." (Transcript p. 51). Sloan's counsel then spent several pages of the transcript pressing Bruder for details concerning the manner in which Sloan's general ledger and other records were "not properly maintained." Invariably, Bruder's answer boiled down to "I can't recall at this time" or words to that effect. For example, on pages 53-54 of the transcript Bruder testified:

> Q. Did you say, Mr. Bruder, that there was no general ledger maintained by Sloan & Co.?
> A. I said the general ledger was not properly maintained.
> Q. I ask you again, how was it improperly maintained then?
> A. I explained that the capital account was not properly maintained. Entries for certain capital were not put in there, also income and expense was not properly recorded there.
> Q. How was the income and expense improperly recorded?
> A. There were missing items.

> Q. Such as?
> A. Certain items of commissions, I would say.
> Q. What specifically were the commissions omitted?
> A. Well, Mr. Sloan had a rather—rather, Sloan & Co. had executed an agency transaction. There were certain commissions that were omitted or in the book. I can't recall at this time.
> Q. Do you know, if your testimony is, sir, that the records were improperly maintained because of this, I ask you what commission was not recorded on what agency transaction?
> A. That, Mr. Taylor, is a very hard question. I can't answer that.
> Q. You don't know, fine, okay. That is the response.

It is submitted that this testimony, which ironically forms the entire basis for the S.E.C.'s finding that "income and expense items were not properly recorded" (App. 25a),[15] does not provide substantial evidence sufficient to justify the revocation of the broker-dealer registration of Sloan & Co. and the lifetime bar preventing Sloan from being associated with any broker or dealer.

In short, the S.E.C.'s case is inordinately weak, if not non-existent. This explains why it is clear that the Court of Appeals did not and could not have reviewed the evidence and found it to be sufficient and why it must have based its decision solely upon its erroneous ruling, discussed *supra*, that an injunction in itself is sufficient to support the

15. On direct examination, Bruder testified that there were "no account records of income and expenses." (Transcript p. 23). Here and elsewhere, when Bruder's testimony on direct examination was in conflict with his testimony on cross examination, the decision of the S.E.C. reflects what Bruder said on cross examination. It is interesting to note that although Bruder testified that Sloan & Co. maintained "no account records of income and expenses," the trial balance he prepared as of January 18, 1971, which is included as Appendix M, has an item labeled "Operating Expenses $5135.05."

revocation of a broker-dealer registration. It should also be pointed out that the decision of the S.E.C. is jurisdictionally defective in that the S.E.C. did not find and the S.E.C. staff did not prove that Sloan or Sloan & Co. purchased or sold any security or made any use of the means or instrumentalities of interstate commerce.

In any event, if the S.E.C. continues to maintain the untenable position that the Court of Appeals reviewed the record and found that the findings of fact were supported by "substantial evidence," it will encounter a problem arising from the point that it is clear from decisions of this Court that in any proceeding brought by the Government in which punishment might be inflicted, the accused has the constitutional right to have the facts tried by a jury as opposed to, in this instance, an Administrative Law Judge whose principal qualification for the job is his many years of dedicated service as an employee of the S.E.C. and who has never found for any respondent in any proceeding over which he has presided. Sloan has been barred for life from being associated with any broker dealer. That is clearly punishment. For that reason, under the Sixth Amendment and possibly the Seventh Amendment, Sloan had the constitutional right to have the facts tried by a jury. This is clear from this Court's decision in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, —— U.S.——, 51 L.Ed. 2d 464 (March 23, 1977). Moreover, it should be noted that the S.E.C. staff proposed that this proceeding be settled with merely a sixty day suspension of Sloan and Sloan & Co. The tremendous desparity between this settlement proposal and the punishment ultimately inflicted demonstrates that the potential for vindictiveness in administrative proceedings before the S.E.C. is high. Indeed, it is evident that the real reason that Sloan has been punished as severely as he has is not that he did anything which violated the Securities Exchange Act but that he was outspokenly critical of the S.E.C. itself. (See

28a-29a). In fact, this is the only case in the history of the S.E.C. in which the same or comparable penalties have been invoked based solely upon a finding of a violation of the net capital, bookkeeping and reporting rules where no fraud was involved. For this reason and because of constitutional considerations too familiar to be recited in detail here, there is a substantial question as to whether the proceedings against Sloan and Sloan & Co. have violated the Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Amendments as well as § 558(c) of the Administrative Procedure Act. It is submitted that this question is of sufficient importance as to require resolution by this Court.

There is one further matter. Shortly after the passage of the 1975 amendments to the Freedom of Information Act, Sloan requested the S.E.C. to provide him with a copy of all documents in its files relating to the investigation and prosecution of Sloan and Sloan & Co. After Sloan gave the S.E.C. numerous extentions of time, the S.E.C. wrote a letter dated September 2, 1976 which stated that, with certain specified exceptions, all of the requested material would be released. However, due in part to problems with the photocopy machine in the public reference room of the S.E.C., Sloan was unable to make copies of the released documents until only about a week before the oral argument of this case before the Court of Appeals.

Contained in the released documents were some statements which contradicted the findings of the S.E.C. For example, the decision of the S.E.C. found that when Kanoff visited Sloan's office on May 6, 1971, he was unable to verify Sloan's trial balance. (App. 25a). However, in a memorandum dated May 7, 1971 which discussed the May 6 visit, Kanoff stated: "To the extent of the trial balance, I was able to verify same." In addition, the released material contained documents which were not in themselves exculpatory but which were sufficient to impugn the validity of certain of the S.E.C.'s findings. For example, one document was a typewritten net capital computation

prepared by an unidentified member of the S.E.C. staff which stated that Sloan & Co. had a net capital deficiency of only $1657.09 on January 29, 1971. Although this computation did not show Sloan & Co. to be in compliance with the net capital rule, it was considerably at variance with the handwritten and illegible computation prepared by Bruder which purported to show a net capital deficiency of $11,912 on the same date.

On the basis of this material, Sloan filed a motion pursuant to Section 25(a)(5) of the Securities Exchange Act, 15 U.S.C. § 78y(a)(5), to remand this case to the S.E.C. with leave to adduce additional evidence. However, the Court of Appeals ignored this motion in its November 18, 1976 decision.

Sloan also appealed to the S.E.C. from the refusal of the S.E.C. on September 2, 1976 to provide him with the remaining documents in accordance with the Freedom of Information Act. This appeal was decided on March 28, 1977 with Commissioners Loomis, Evans and Pollack participating. The decision was that the previously withheld documents would be released to Sloan with the exception of those parts which contained staff opinions which would be excised. Sloan actually obtained the documents on April 20, 1977.

Among the documents released to Sloan was a five page memorandum dated February 16, 1971 which stated:

> On February 4, 1971 a member of the staff visited Registrant's offices in order to determine (1) whether Registrant was still conducting business and (2) whether Registrant's books and records had been put in order.
>
> It appeared that Registrant was still conducting business as a broker-dealer. It further appears that Registrant has no public customers and is dealing strictly for its own account. Further, Registrant's

> books and records now appear to be current and are being brought to order and appear to balance.
>
> On February 4, the staff prepared another trial balance which also reflected the firm's financial condition as of January 18, 1971. An analysis of the trial balance indicated [remainder of paragraph excised].
>
> According to the second analysis of the firms January 18, 1971 position prepared on February 4, it appears that registrant is now in compliance with the Commission's Net Capital Rule. Registrant's capital situation now appears to be as follows:

Aggregate Indebtedness	$9,565.76
Required Minimum Net Capital	$5,000.00
Adjusted Net Capital	$9,572.92
Total (Excess)	$4,572.92

The above quoted passage is exculpatory in nature and is of such high value that it could not have been overlooked by the S.E.C. Clearly, the existence and contents of this memorandum should have been made known to the defense prior to the administrative hearing and the failure of the S.E.C. to do so requires either a remand or an outright reversal of the decision of the S.E.C. See *United States v. Rosner*, 516 F.2d 269, 272 (2d Cir. 1975) citing *Jencks v. United States*, 353 U.S. 657 (1957) and other cases. This is particularly true since the Administrative Law Judge denied the request by Sloan's counsel to examine the investigatory files of the S.E.C. (Transcript p. 109-110).

The importance of the fact of this February 4, 1971 visit cannot be overestimated. In addition to the obvious points, it should be noted that the S.E.C. never previously revealed, either in this administrative proceeding or in the parallel injunctive proceeding, that a visit on February 4, 1971 took place. The S.E.C. did find that Bruder visited Sloan's office

on February 25, 1971. (App. 25a). However, Bruder actually testified that he received Sloan's trial balance and prepared his computation of January 29, 1971 on February 25, 1971 in the offices of the S.E.C., not in Sloan's office. (Transcript pp. 37, 83). None of the memorandums prepared by the S.E.C. and released pursuant to the Freedom of Information Act mention any visit by any S.E.C. investigator to Sloan's office in February, 1971 on any date other than February 4, 1971. Thus, it appears that the February 25, 1971 visit, which the S.E.C. "found" in its decision (App. 25a), never took place.[16]

The memorandum's released to Sloan contain numerous additional items of interest. For example, one memorandum stated that on November 24, 1970 the New York Regional office of the S.E.C. denied the request of Sloan & Co. for an extention of time to file its Rule 17a-5 report. However, Sloan and Sloan & Co. were never notified of the denial of this request. Under S.E.C. Rule 17a-5(d), the denial of such a request must be by order in writing. In the *Matter of International Shareholders Services Corp.*, 9 S.E.C. Docket 821, 823; Securities Exchange Act Release No. 12389 (June 8, 1976) the S.E.C. dismissed a proceeding based on a Rule 17a-5 violation on the ground that its staff had failed to comply timely with this rule. Based upon that decision the finding of the Rule 17a-5 violation here should also be set aside. It is clear that the S.E.C. staff did not enter an order and give any written notification to Sloan and Sloan & Co. because had it done so it would have retained a copy in its records and the material released to Sloan under the Freedom of Information Act, which is

16. Judge Ward also "found" that a February 25, 1971 visit had occurred. See *S.E.C. v. Sloan, supra*, 369 F. Supp. 996, 369 F. Supp. 996, 998, ¶9. However, it is obvious that Judge Ward merely copied the proposed findings of fact submitted by the S.E.C. before the trial because had he checked the trial transcript he would have seen that Bruder never testified that he visited Sloan's office in February, 1971. It is significant to note that the Administrative Law Judge did not "find" that there had been a February 25, 1971 visit but rather found that there had been a visit on January 25, 1971. (App. 11a).

supposed to include all the files and records of the S.E.C., contained no order of notification. Sloan did not and could not have argued the significance of these points before the S.E.C., because the Freedom of Information Act material just discussed was not released to him until long after the S.E.C. concluded its proceedings. Therefore, at a minimum, this case should be remanded pursuant to §25(a)(5) of the Securities Exchange Act with leave to adduce additional evidence.[17]

In addition to the foregoing matters, this petition requests this Court to review that part of the decision of the Court of Appeals which upheld the validity of the initial order suspending trading in the stock of Canadian Javelin Ltd. Petitioner contends that the order in question was not supported by substantial evidence and that a summary suspension of trading is unconstitutional. Moreover, petitioner contends that the questions presented are of sufficient importance as to require the granting of a petition for a writ of certiorari.

It can be seen from examining Appendix L that the Court of Appeals is in error when it states that the record demonstrates "sufficient evidence of probable manipulation of [Canadian Javelin Ltd's] common stock and of the false and fraudulent representations as to its soundness and value. . . ." 547 F.2d at 156. The record itself, which consists of appendix K and appendix L, says something entirely different and is devoid of "substantial evidence." In addition it is clear from *National Cable Television v. United States*, 415 U.S. 336, 342 (1974) that a law which gives an independent administrative agency the broad authority to act in accordance with what it perceives to be the "public interest" and which provides no stan-

17. In December, 1975 Sloan requested that the S.E.C. itself grant this relief on different grounds but the New York Regional Office opposed Sloan's motion with a memorandum which stated that under §25(a) the Court of Appeals has "exclusive jurisdiction" to do so. The motion was denied.

dards to guide the administrative agency in making the decision whether to act, is unconstitutional as a delegation of legislative power. On this basis, it is submitted that Section 12(k) of the Securities Exchange Act is unconstitutional.

CONCLUSION

For all of the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 4, 1977

APPENDIX A
ORDER FOR PUBLIC PROCEEDINGS

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

————————————————————X

In the Matter of

SAMUEL H. SLOAN d/b/a
SAMUEL H. SLOAN & CO. (8-15750)
————————————————————X

I

The Commission's public official files disclose that

A. Samuel H. Sloan d/b/a Samuel H. Sloan & Co. (Sloan & Co.) a sole proprietorship with his principal place of business at 120 Liberty Street, New York, New York, has been registered with the as a broker-dealer pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") since May 10, 1970.

B. Sloan & Co. is a member firm of S.E.C.O.

II

As a result of an investigation, the Division of Trading and Markets has obtained information which tends to show and it alleges that:

A. During the period from about January, 1971 and continuing to the present, Sloan & Co. has willfully violated Section 17(a) of the Exchange Act and Rules 17a-3 and 17a-4 thereunder in that Sloan & Co. has failed to

accurately make, keep current or maintain certain of its books and records including, but not limited, to:

(1) ledgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts;

(2) A securities record or ledger reflecting separately for each security as of the clearance dates of all "long" and "short" positions (including securities in safekeeping) carried by such member, broker or dealer for his account;

(3) Ledgers (or other records) reflecting securities failed to receive and to deliver;

(4) Copies of all confirmations of all purchases and sales of securities and copies of notices of all other debits and credits for securities, cash and other items for the account of customers and partners of such member, broker or dealer; and

(5) A record of proof of money balances of all ledger accounts in the form of trial balances.

B. During the period from about January 1971 to on or about January 31, 1972 with the exception of the month of March 1971, Sloan & Co. willfully violated Section 15(c)3 of the Exchange Act and Rule 15c3-1 thereunder in that Sloan & Co. made use of the mails and means and instrumentalities of interstate commerce to effect transactions in and to induce and attempt to induce the purchase and sale of securities (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange when Sloan & Co.'s aggregate indebtedness to all other persons exceeded 2,000 per centum of its net capital and Registrant did not have and did not maintain net capital of not less than $5,000.

C. During the period from on or about October 10, 1970 to March 5, 1971, Sloan & Co. willfully violated Section 17(a) of the Exchange Act and Rule 17a-5 thereunder, in

that Sloan & Co. failed to file a report of its financial condition with the Commission for the calendar year 1970 within the time specified by said rule.

D. During the period from on or about April 30, 1971 to on or about December 2, 1971, Sloan & Co. willfully violated Section 17(a) of the Exchange Act and Rule 17a-10 thereunder, in that Sloan & Co. failed to file a report of income and expenses with the Commission for the calendar year 1970 within the time specified by said Rule.

E. From on or about September 15, 1971, to the present, Sloan & Co. willfully violated Section 17(a) of the Exchange Act and Rule 17a-11 thereunder in that Sloan & Co. failed to telegraphically notify the Commission that it was not in compliance with the net capital rule (15c3-1), file within 24 hours a report of its financial condition or file a Form X-17a-11 report within the time specified by said Rule.

F. On June 24, 1971, the United States District Court for the Southern District of New York entered an order by consent, which order preliminarily enjoined Sloan & Co. and Sloan from conducting a business as a broker-dealer in securities at a time when Sloan & Co. or any other registered broker-dealer of which Sloan became a principal or controlling person was not in compliance with Sections 15(c)(3) and 17(a) of the Exchange Act and Rules 15c3-1, 17a-3 and 17a-4 thereunder.

III

In view of the allegations made by the Division of Trading and Markets, the commission deems it necessary that public proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and in connection therewith to afford respondents an opportunity to establish any defenses to such allegations; and

B. What, if any, remedial action is appropriate in the public interest pursuant to Section 15(b) and 15A of the Exchange Act.

IV

It is Hereby Ordered that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof be held at a time and place to be fixed and before a hearing examiner to be designated by further order as provided by Rule 6 of the Commission's Rules of Practice (17 CFR 201.6).

It is Further Ordered that each party file an answer to the allegations contained in the order for proceedings within fifteen (15) days after service upon him of said order provided by Rule 7 of the Commission's Rules of Practice.

If any party fails to file the directed answer or fails to appear at a hearing after being duly notified, such party shall be deemed in default and the proceedings may be determined against such party upon consideration of the order for proceedings, the allegations of which may be deemed to be true.

This order shall be served upon Sloan & Co. and Sloan personally or by certified mail forthwith.

By the Commission.

s/Ronald F. Hunt
Ronald F. Hunt
Secretary

APPENDIX "B"
ORDER POSTPONING HEARING AND DENYING MOTION FOR MORE DEFINITE STATEMENT

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
July 31, 1972

In the Matter of
SAMUEL H. SLOAN d/b/a
SAMUEL H. SLOAN & CO.
(8-15750)

The order for proceedings ("Order") entered on April 25, 1972 pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Act") is based upon charges of the Division of Trading and Markets ("Division") that registrant, Samuel H. Sloan & Co. wilfully violated Sections 15(c)(3) and 17(a) of the Act and Rules 15c3-1, 17a-3, 17a-4, 17a-5, 17a-10 and 17a-11, thereunder.

On June 15, 1972 a prehearing conference was held which resulted in an order by the undersigned concerning specific items to which the parties had agreed to stipulate. In addition, on June 20, 1972, counsel for registrant met with counsel for the Division at which time all documents relating to Paragraphs A & B of the Order were reviewed.

Registrant has moved for a more definite statement as to paragraph A and E of the Order. Registrant seeks details regarding its own records concerning ledger, stock record, ledgers for Fail to deliver and Fail to receive, confirmations of customers and partners and trial balances. Registrant, also moves for continuation of the hearing pending compliance with the Order under this motion.

The Division, in opposition points out that the stipulation, which was the subject of the Order of June 16, 1972, has been executed and that on June 20, 1972 registrant was allowed to examine all net worth computations prepared by the Division.

It is well-established that in a notice of hearing such as the one in question, a respondent is entitled to sufficient information concerning the charges and issues involved to permit him to make adequate preparation of a defense, but is not entitled to a disclosure of the evidence upon which the Division intends to rely for proof of those charges and issues. *M.J. Reiter Co.*, 39 SEC 484 (1959); *Keith Richard Securities Corp.*, 39 SEC 240 (1958). Nor is it necessary for the notice of proceedings to detail and itemize "all the particular acts, which together constitute the offense." *Michael J. Meehan*, 1 SEC 238, 240 (1935).

Under applicable principles it appears that in view of the pre-hearing conference and subsequent order concerning the stipulation of facts and the June 20th meeting with Division counsel registrant has been reasonably apprised of the charges against it, and it not entitled to the sought-for particulars as a matter of right.

Accordingly, It is Ordered that the motion of registrant for a more definite statement is denied except to the extent it has already been complied with by the Division.

It is Ordered, further, that the hearing now scheduled to commence on August 14, 1972 is postponed to 11:00 A.M. on September 11, 1972, at the place heretofore designated.

s/Ralph H. Tracy
Ralph H. Tracy
Hearing Examiner

APPENDIX "C"
ORDER ON MOTION FOR MORE DEFINITE STATEMENT

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
August 18, 1972

In the Matter of

SAMUEL H. SLOAN d/b/a
SAMUEL H. SLOAN & CO.

(8-15750)

The order for proceedings ("Order") entered on April 25, 1972 pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Act") is based upon charges of the Division of Trading and Markets ("Division") that registrant, Samuel H. Sloan & Co., wilfully violated Sections 15(c)(3) and 17(a) of the Act and Rules 15c3-1, 17a-3, 17a-4, 17a-5, 17a-10 and 17a-11, thereunder.

On June 15, 1972 a prehearing conference was held which resulted in an order by the undersigned concerning specific items to which the parties had agreed to stipulate. In addition, on June 20, 1972, counsel for registrant met with counsel for the Division at which time all documents relating to Paragraphs A & B of the Order were reviewed.

Registrant's motion for a more definite statement as to paragraph A and E of the Order was denied on July 31, 1972. Registrant has now renewed its motion as to the following particular documents:

1. Copies of computations as at the month end for: 1-18-71, 1-29-71, 2-26-71, 6-30-71, 7-31-71, 8-31-71, 9-30-71, 10-8-71, 10-19-71, 11-30-71, 12-2-71, 12-31-71, and 1-31-72.

2. Copies of long and short positions as marked to the market on each of the respective dates.

3. Copies of all exhibits stipulated to.

In view of the prehearing conference and subsequent order concerning the stipulation of facts and the June 20th meeting with Division counsel at which time respondent was shown the requested documents, and upon consideration of all the circumstances,

It is Ordered that the motion of respondent for a more definite statement is granted and that the requested documents be furnished forthwith.

s/Ralph H. Tracy
Ralph H. Tracy
Hearing Examiner

APPENDIX "D"
INITIAL DECISION

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

SAMUEL H. SLOAN d/b/a
SAMUEL H. SLOAN & CO.

(8-15750)

APPEARANCES:

Alan R. Rashes, Jerome M. Selvers and Thomas Beirne, of the New York Regional Office of the Commission for the Division of Enforcement.

Robert W. Taylor for Samuel H. Sloan and Samuel H. Sloan & Co.

BEFORE:

Ralph Hunter Tracy, Administrative Law Judge

THE PROCEEDING

This is a public proceeding instituted by an order of the Commission ("Order") dated April 25, 1972, pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether, as charged by the Division of Enforcement ("Division")[1] Samuel H. Sloan ("Sloan") d/b/a Samuel H. Sloan & Co., ("Sloan & Co." or "registrant") willfully violated Sections 15(c)(3) and 17(a) of the Exchange Act and Rules 15c3-1, 17a-3,4,5,10, and 11, thereunder, during various specified periods, and the remedial action, if any, that might be appropriate in the public interest.

The order included an allegation that on June 24, 1972, the U.S. District Court for the Southern District of New York had entered a consent decree temporarily enjoining respondents from violating certain of the foregoing counts.

Respondents were represented by counsel throughout the proceeding and proposed findings of fact and conclusions of law and briefs in support were filed by the parties.

The findings and conclusions herein are based upon the preponderance of the evidence as determined from the record and upon observation of the witnesses.

FINDINGS OF FACT AND LAW

Respondents

Sloan is the sole proprietor of Sloan & Co., 120 Liberty Street, New York, New York, which has been registered with the Commission as a broker-dealer pursuant to Section 15(b) of the Exchange Act since May 10, 1970. Registrant has never been a member of the National Association of Securities Dealers ("NASD").

Injunctions Chargeable to Respondents

Section 15(b)(5)(C) of the Exchange Act provides that one of the bases for revocation of a broker-dealer's registration or the imposition of lesser sanctions is the existence of a described permanent or temporary injunction issued by a court of competent jurisdiction.[2]

The Order alleges, and the record establishes, that on June 24, 1971, the U.S. District Court for the Southern District of New York entered a consent judgment preliminarily enjoining Sloan & Co. and Sloan from conducting a business as a broker-dealer in securities at a time when Sloan & Co. or any other registered broker-dealer of which Sloan became a principal or controlling person was not in compliance with the Commission's net

capital and bookkeeping rules. In addition, the Court ordered Sloan to engage the services of a certified public accountant to prepare a certified report of the firm's financial condition, as of June 30, 1971, to be in the Commission's possession no later than July 31, 1971.

Bookkeeping Violations

The record establishes that during the period from January, 1971 to April 25, 1972, registrant, as charged in the Order, committed a number of violations of Section 17(a) of the Exchange Act and Rules 17a-3 and 17a-4 thereunder by failing to maintain and to keep accurate and current certain required books and records.[3] At the time of an inspection of the books and records of registrant conducted by a Commission investigator on January 12, and 13, 1971, a number of deficiencies existed. The general ledger disclosing assets, liabilities, income and expense, and capital account, was not current; no account record of bank balances or income and expenses was being kept; the firm's trading account, the fail to deliver and the fail to receive accounts were not current; the Sloan capital account was only posted to July 19, 1970; no trial balances had been prepared;[4] and the stock record was not in compliance. Registrant was informed of these violations by Commission letter of January 14, 1971, and requested to submit a trial balance supported by certain specified schedules. On January 18, 1971, registrant submitted what purported to be a trial balance but the Commission investigator testified that a net capital computation could not be prepared from it so on January 25, 1971, he returned to registrant's office and prepared a computation of net capital as of January 18, 1971, using whatever books and records available.

Subsequent visits to registrant's office by another Commission investigator in March, April, May, June and August, 1971 disclosed that the books and records were not

in compliance and on at least one occasion were not available for inspection. Furthermore, during the approximately sixteen month period charged in the Order it was necessary to average about three requests per month in order to obtain even the semblance of a trial balance from registrant.

Respondents argue that registrant "did maintain the books and records required under Section 17(a) and Rules 17a-3 and 17a-4." In support of this contention they assert that the testimony of the two Commission investigators concerning numerous violations of the record keeping rules was "so absolutely incredible as to defy understanding." However, the record does not support this contention. On the contrary, a careful review of their testimony, together with some 19 supporting exhibits, plus observation of their demeanor, leads to the conclusion that rather than being incredible their testimony was credible and worthy of belief.

The requirement that records be kept embodies the requirement that such records be true and correct.[5] Compliance with the rule relating to maintenance of books and records is regarded as an "unqualified statutory mandate" dictated by a broker-dealer's obligation to investors to conduct its securities business on a sound basis.[6]

Respondents' other principal argument is that there is no evidence that they willfully violated the record keeping requirements. The argument that any violation arising out of the failure to make and keep current registrant's books and records cannot be considered "willfull" is rejected. Willfullness for purposes of Section 15(b) of the Exchange Act does not require that a person know that he is breaking the law but only that he intended to do the act that resulted in the violation.[7]

Upon consideration of all the circumstances it is found that Sloan, d/b/a Samuel H. Sloan & Co., willfully

violated Section 17(a) of the Exchange Act and Rules 17a-3 and 17a-4 thereunder as alleged in the Order.

Net Capital Violations

The Order charges that during the period from January 1971, until on or about January 31, 1972, with the exception of the month of March 1971, registrant willfully violated the net capital provisions of Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder.[8]

The record clearly establishes that during the relevant periods registrant was in violation of the Commission's net capital requirements and that the additional capital required to bring it into compliance on the dates indicated was as follows:

Date	Per SEC	As Adjusted (a)
1-18-71	$28,016.70	No change
1-29-71	11,912.35	No change
2-26-71	15,961.36	No change
3-31-71	10,239.22 (b)	No change
6-30-71	24,222.03	19,221.96 (c)
7-31-71	70,864.99	70,064.99
8-31-71	16,588.73	15,789.33
9-30-71	11,529.69 (d)	10,729.69 (d)
10-8-71	8,345.49 (d)	7,545.49 (d)
10-29-71	18,253.50 (d)	12,453.50
11-30-71	9,810.10 (d)	4,010.79 (d)
12-31-71	13,480.42 (d)	4,557.22 (d)
1-31-72	718.23	

(a) As a result of a prehearing conference the Division furnished its net capital computations and supporting data to registrant's counsel who is, also, its accountant. Prior to the evidentiary hearing Division's representative and registrant's accountant arrived at the adjusted figures.

(b) The month of March originally showed net capital of $7,760.78. However, this included $18,000 of customer credit balance.

(c) Prepared pursuant to order of the Court which issued the temporary injunction. (*Supra* p. 2).

(d) Does not include an alleged personal trading loss by Sloan which is in arbitration before the NYSE. Its inclusion would increase the net capital deficiency by $13,000 for each period.

Respondents do not contend that registrant was at all times in compliance with the Commission's net capital rules. Rather, they argue that at a conference with representatives of the Commission's New York Office on July 28, 1971, an agreement was reached whereby the registrant would cease doing a retail business but would be allowed to liquidate accounts and transact personal business and that in accordance with this agreement registrant did cease doing business after July 28, 1971 and, therefore, could not be in violation of the net capital requirements after that date. In support of this argument they again attack the testimony of, and the evidence supplied by, the Commission investigators that Sloan was in fact actively engaged in consummating securities transactions after July 28, 1971. In addition, the argument is again advanced that any violation of Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder was not willfull.

All of respondents arguments are rejected. The registrant's trading record supports the Division's contention that registrant engaged in new business in July, August and September, 1971. During the month of August, 1971, registrant transferred a number of securities resulting from the transaction of new business to the brokerage firm of J.S. Love & Co., while representing to the Commission staff that such securities were in the possession of Sloan & Co.

In December 1971 and January, 1972, while in net capital violation, registrant applied to the National Quotation Bureau and had a number of securities listed in the pink sheets in an attempt to induce the purchase or sale of such securities while in violation of the Commission's net capital rules and while under a Court order enjoining such activities.

Sloan's disregard for the securities laws is well illustrated by his attitude towards the net capital requirements. In order to conceal registrant's true net capital situation he included as firm capital a $10,000 customer credit balance for January, 1971; $60,000 of customer's securities for February, 1971; and an $18,000 customer credit balance for March 1971. For other periods he claimed a $10,000 gift from his mother, which was not supported; improperly valued shares of stock; failed to keep records from which a proper determination of net capital could be ascertained; procrastinated in the production of books and records in order to delay an accurate examination; and was uncooperative in producing trial balances and other financial information. His testimony in the proceeding concerning his activities and his alleged efforts to comply with the securities laws is not worthy of belief.

Registrant's inability to properly determine its financial condition flows, at least in part, from its failure to comply with Section 17(a) of the Exchange Act and Rules 17a-3, 17a-3(a)(11) and 17a-4 thereunder and well illustrates the Commission's repeated emphasis on the requirement that books and records be kept current and accurate as being at the heart of the regulatory scheme, particularly as it bears significantly on the ability to determine whether other types of violations have occurred.[9] It is found that registrant and Sloan willfully violated the net capital provisions of Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder.

Failure to File Required Reports

Under the provisions of Section 17(a) of the Exchange Act and Rule 17a-5 thereunder, registrant's Form X-17A-5 for the year 1970, was due to be filed no later than November 23, 1970 as of October 10, 1970. No X-17A-5 report was filed by registrant for 1970 and Sloan admits in his answer that he failed to file such report. Sloan & Co. did file an X-17A-5 report as of January 29, 1971, on March 31, 1971. However, this was treated as a 1971 filing and did not discharge Sloan from his obligation to file a report for 1970. Sloan testified that he was aware of the requirement to file a report on Form X-17A-5 for 1970 but that the only qualified accountant he was able to obtain to prepare the report was not able to because of his association with another broker-dealer.

The registrant cannot avoid the responsibility placed on it for filing an X-17A-5 report has been clearly expressed by the Commission in the case of *John Munroe*, 39 SEC 308 (1959) where it stated:

> "The obligations to file financial reports annually, as well as other obligations set forth in the Act and the rules and regulations thereunder, are imposed upon registrants directly and are non-delegable. A registrant can obtain all the assistance he needs from clerks, accountants, attorneys, and others but he cannot instruct anyone to see to it that he is brought into compliance with applicable rules and regulations and feel that he has thereby fully discharged his obligations."

Sloan admits that for the period from January 1, 1971 to December 2, 1971, registrant failed to file a report of income and expenses with the Commission for the calendar year 1970 and thereby violated Section 17(a) of the Exchange Act and Rule 17a-10 thereunder.[10]

Sloan expresses no contention whatever concerning the

alleged violation of Rule 17a-11 under section 17(a) of the Exchange Act.[11] However, the record establishes that no telegraphic notice or report of financial condition was ever received from registrant.

Accordingly, it is found that Sloan and registrant violated section 17(a) of the Exchange Act and Rule 17a-11 thereunder, as alleged in the Order.

In their brief respondents argue that registrant's report of income and expense required under Rule 17a-10 was filed on December 2, 1971; that its financial report required under Rule 17a-5 for 1970 was filed on March 31, 1971, as of January 29, 1971 and marked "Amended"; that such reports were filed before the date of the Order and accepted by the Commission and, therefore, the alleged violations are merely technical in nature and the whole question becomes academic in view of the filings. Respondents do not address themselves to the alleged violation of Rule 17a-11.

There is no merit to respondents' contentions. The Commission has repeatedly expressed itself in no uncertain terms that "the requirement that annual reports be filed cannot be characterized as merely 'technical' ",[12] and that "the requirement that annual financial reports be filed on time and in proper form is a keystone of the surveillance of registered broker-dealers with which we are charged in the interest of affording protection to investors, and full compliance with it is essential".[13]

Public Interest

Respondents' willfull violations require consideration of the sanctions which are necessary in the public interest. In this connection the Division believes the conduct of respondents warrants a revocation of Sloan & Co.'s registration and a bar against Sloan's association with any broker-dealer. On the other hand, Sloan argues that no

public interest can be served by extremely and severely sanctioning him or registrant, particularly since, he alleges, he has suffered a financial loss of $30,000 resulting from his July 28, 1971, agreement with the Commission to cease doing business. In any event, respondents urge, any violations found herein were not willfull.

The violations found to have occurred herein are numerous, serious and continued over an extended period of time. Each violation has been previously discussed in detail but the cumulative effect must be taken into account in considering appropriate sanctions to be applied for the protection of investors. This is particularly true here, where one person, Sloan, was at all times responsible for the conduct of registrant's business. In considering mitigating circumstances there is no evidence in the record as to Sloan's alleged loss and it appears to be merely a projection of what he was allegedly prevented from earning by not being allowed to conduct business while not in compliance with the securities laws and under Court order. This is a self-serving statement and is given no weight in the circumstances. As to the question of willfullness, this has previously been dealt with in this decision.[14] All of the violations previously found herein are found to have been willfull. It is well established that a finding of willfullness under section 15(b) of the Exchange Act does not require an intent to violate the law and that it is sufficient that a respondent intentionally engage in conduct which constitutes a violation.[15]

The record of the registrant and Sloan, as evidenced by the violations found in this proceeding, reflects an unwillingness or a lack of capacity to operate as a broker-dealer in conformity with applicable laws and regulations. The impression imparted by Sloan through his actions as reflected by the record and his appearance as a witness is that of an individual who has no comprehension of what is required to properly manage a securities business. The fact

that it was necessary for Commission staff members to make innumerable visits and inquiries in an effort to obtain compliance on the part of registrant; Sloan's uncooperative attitude towards such efforts; the necessity of a Court order and a proceeding in an endeavor to prevent violations inimical to investors indicate the unlikelihood that respondents will observe the Commission's rules applicable to the conduct of a broker-dealer business. Therefore, under the circumstances, it is concluded that the registration of registrant should be revoked and that Sloan should be barred from association with any broker-dealer.[16]

ORDER

Accordingly, It is Ordered that the registration as a broker-dealer of Samuel H. Sloan & Co. is revoked and that Samuel H. Sloan is barred from association with a broker-dealer.

This order shall become effective in accordance with and subject to Rule 17(f) of the Commission's Rules of Practice.

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party who has not within fifteen days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c) determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.[17]

Ralph Hunter Tracy
Administrative Law Judge

Washington, D.C.
April 24, 1973

FOOTNOTES

1. This Division was formerly the Division of Trading and Markets.

2. Section 15(b)(5)(C) provides as follows:

> "(5) The Commission shall, after appropriate notice and opportunity for hearing, by order censure, deny registration to, suspend for a period not exceeding twelve months, or revoke the registration of, any broker or dealer if it finds that such censure, denial, suspension or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated—
>
> ***
>
> (C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, or dealer, or as an affiliated person or employee of any investment company, bank, or insurance company; or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security."

3. Section 17(a) of the Exchange Act, as pertinent here, requires brokers and dealers to make and keep current such books and records as the Commission may prescribe as necessary and appropriate in the public interest or for the protection of investors. Rule 17a-3 specifies the books and records which must be maintained and kept current. Rule 17a-4 specifies the preservation of such records.

4. Rule 17a-3(11) requires that "such trial balances and computations shall be prepared currently at least once a month."

5. *Lowell Niebur & Co., Inc.*, 18 SEC 471, 475 (1945).

6. *Billings Associates, Inc.*, Exchange Act Rel. No. 8217, p. 8 (Dec. 28, 1967).

7. *Hughes v. SEC*, 174 F.2d 969, 977 (C.A.D.C. 1949); *Churchill Securities Corp.*, 38 SEC 856, 859 (1959); *Thompson Ross Securities Co.*, 6 SEC 1111, 1122 (1940).

8. Section 15(c)(3) of the Exchange Act, insofar as here pertinent, prohibits securities transactions by a broker-dealer in contravention of the Commission's rules prescribed thereunder providing safeguards with respect to the financial responsibility of brokers and dealers. Rule 15c3-1 provides, subject to certain exemptions not applicable here, that no broker or dealer shall permit his aggregate indebtedness to all persons to exceed 2,000% of his net capital computed as specified in the rule or have a net capital of less than $5,000.

9. *Pennaluna & Company, Inc., et al.*, Securities Exchange Act Release No. 8063 (April 27, 1967); *Palombi Securities Co., Inc., et al.*, 41 SEC 266, 276 (1962); *Midland Securities, Inc., et al.*, 40 SEC 333, 339-340 (1960); *Olds & Company*, 37 SEC 23, 26-27 (1956).

10. Rule 17a-10 provides that every broker or dealer registered pursuant to section 15 of the Exchange Act shall, not later than 120 days after the close of each calendar year, file a report of income and expenses and related financial and other information for such calendar year on Form X-17A-10.

11. Rule 17a-11 provides that every broker-dealer subject to Rule 15c3-1 whose net capital at any time is less than the minimum required by any net capital rule to which he is subject shall give telegraphic notice of such deficiency to the Commission on the day it occurs and shall, within 24 hours thereafter, file a report of financial condition in accordance with details specified in the Rule.

12. *Samson, Roberts & Co., Inc.*, Exch. Act Rel. No. 7593 (May 4, 1965); see, also, *Family Funds of New York, Inc.*, Exch. Act Rel. No. 7358 (June 30, 1964); *John J. Murphy*, 38 SEC 430, 432 (1958).

13. *W.E. Leonard & Company, Inc.*, 39 SEC 726, 727 (1960); see *Olds & Company*, 37 SEC 23, 26-7 (1956).

14. See page 5 footnote 7 *supra*.

15. *Dunhill Securities Corporation*, Exch. Act Rel. No. 8563, p. 5 (July 14, 1969); *Tager v. SEC*, 344 F. 2d, 5, 8, (CA 2, 1965).

16. It should be noted that a bar order does not preclude the person barred from making such application to the Commission in the future as may be warranted by the then-existing facts. *Fink v. SEC* (C.A. 2, 1969), 417 F.2d 1058, 1060; *Vanasco v. SEC*, (C.A. 2d, 1968) F.2d 349, 353.

17. To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them are in accordance with the views herein they are accepted, and to the extent they are inconsistent therewith they are rejected.

APPENDIX E

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 11376/April 28, 1975

Admin. Proc. File No. 3-3680

In the Matter of

SAMUEL H. SLOAN

doing business as SAMUEL H. SLOAN & CO. 120 Liberty Street, New York, New York, (8-15750)

SECURITIES & EXCHANGE COMM.
MAILED FOR SERVICE
APR 30 1975
CTFD. NO. 804363 thru 804366

FINDINGS AND OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDINGS

Ground for Remedial Action

Where registered broker-dealer willfully violated Exchange Act's record keeping, net capital and reporting provisions and had also been enjoined from violating certain of those provisions as well as those requiring that records be made available for examination by Commission representatives and precluding the initiation of quotations without specified information, *held*, public interest requires revocation of broker-dealer registration, and bar of sole proprietor from association with any broker-dealer.

APPEARANCES:

Robert W. Taylor for Samuel H. Sloan, doing business as Samuel H. Sloan & Co.; and *Samuel H. Sloan, pro se*.

William D. Moran, William Nortman, Thomas R. Beirne, Alan M. Rashes and *Jerome M. Selvers,* for the Division of Enforcement of the Commission.

I. *BACKGROUND*

This case deals with the back office operations of a small securities firm in New York City. Finding serious deficiencies in those operations and an injunction based thereon, the administrative law judge revoked the broker-dealer registration of Samuel H. Sloan & Co. ("registrant"), and barred Samuel H. Sloan, registrant's sole proprietor, from association with any broker or dealer.[1] Respondent's petition for review of that decision brings the case to us.[2]

This administrative proceeding is closely intertwined with a judicial one. On our complaint, the United States District Court for the Southern District of New York preliminarily enjoined respondent on June 24, 1971, with his consent, from effecting transactions while registrant was not in compliance with the recordkeeping and net capital provisions under the Securities Exchange Act.[3] Thereafter the instant proceeding was instituted. It was based on the preliminary injunction and on specified violations, most of which had also been allegef in the injunctive action.[4] Following the issuance of the administrative law judge's initial decision which took cognizance of the preliminary injunction, the court in January 1974, after a trial, entered a permanent injunction.[5]

II. *RECORDKEEPING VIOLATIONS*

We find, as did the administrative law judge, that registrant willfully violated the recordkeeping provisions of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder.[6] A broker-dealer inspection conducted by our staff in January 1971 (about eight months after registrant's registration became effective) revealed various infractions in this area. Following such inspection, registrant was kept

under close surveillance with frequent visits being made by our staff from January to Asgust 1971.

The initial inspection disclosed, among other things, that capital, income and expense items were not properly recorded in registrant's general ledger; that the stock record was not kept current; that there was no account record of bank balances; and that no trial balance had been prepared. Stating that the inspection showed that respondent's records did not comply with our requirements and afforded no basis for establishing his financial position, our staff asked Sloan to produce a trial balance and other data. He furnished something. But no capital computation could be made from what he submitted.

A subsequent examination was made on February 25. It disclosed that the stock record and customer ledger were not up-to-date, and that the income and expense account was not properly maintained. A March 19 examination revealed a capital contribution on the books of $58,175 when, in fact, no such contribution had been made.

On April 8 our investigator was once more in respondent's office. But he could not conduct an examination. According to him, Sloan said "he had no books, per se"—all he had were debit and credit slips pending the receipt of "machine runs" from a bookkeeping service that used the slips to produce his records. From those slips our investigator was unable to prepare a trial balance. Having received the March 31 trial balance eleven days after his April 8 request for it, he returned to registrant's office on May 6 to verify it. But he could not do so. He was unable to obtain the stock record and daily blotter. But the books were unavailable.[7] When he was able to make an inspection two days later, he found the general ledger posted only through July 31.

The foregoing chronicle shows extensive and persistent recordkeeping deficiencies during the first eight months of 1971.[8] Moreover, computations of net capital during that

year were not prepared as required.[9] And our staff generally had to make about two or three requests for each trial balance it obtained from registrant.[10]

III. *NET CAPITAL VIOLATIONS*

We find, as did the administrative judge, that registrant willfully violated Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder by effecting securities transactions and attempting to induce them when registrant's aggregate indebtedness exceeded 2,000% of registrant's net capital.

Net capital deficiencies ranging from $718 to $70,064 were found by the administrative judge on ten dates in 1971 and on an eleventh date in January of 1972.[11] And respondent does not challenge those findings. What he attacks is the administrative judge's finding that he engaged in so-called "new" business from the end of July to September. He claims that such business as he did in that period consisted entirely of liquidating his long positions and covering his short positions. That, he says, was permissible under an agreement that he had reached with our staff on July 28, which allowed him to close out existing positions but precluded him from conducting new business.

But Sloan's own testimony shows that he engaged in the securities business in the usual unrestricted sense from January to July 28, 1971. And in January of 1972 he inserted quotations for various securities in the sheets published by the National Quotation Bureau, Inc. In view of registrant's net capital deficiencies in January, February, June and July, 1971,[12] and in January of 1972, during those periods registrant clearly violated the Exchange Act's net capital requirements.[13] It is equally clear that those violations were willful[14] as that term is used for Exchange Act purposes.[15]

IV. *NONCOMPLIANCE WITH REPORTING REQUIREMENTS*

Respondent's Rule 17a-5 report of financial condition for

1970 and his report of income and expenses under Rule 17a-10 for the same year were admittedly filed late.[16] Hence registrant willfully violated Section 17(a) of the Exchange Act and Rules 17a-5 and 17a-10.[17]

V. *INJUNCTION*

As noted at the outset, the preliminary injunction on which this proceeding was initially based has now become permanent. The permanent injunction, unlike the preliminary one, was entered after a trial. On the basis of the evidentiary record before it, the court found willful violations of our recordkeeping and net capital provisions, in a number of instances the same or substantially the same as those that we have found on the basis of the record before us.[18] Those judicial findings show a continual pattern of recordkeeping and net capital violations including some between May 1973 and January 1974, a period subsequent to that involved in these proceedings.[19]

VI. *OTHER MATTERS*

Sloan says that institution of the earlier injunctive action constituted an election by us of the forum in which to proceed against him.[20] That is not so.[21] The Exchange Act provides several parallel and compatible procedures for the attainment of its objectives, and resort to one avenue does not preclude the use of another.[22] The injunctive and administrative remedies serve different purposes, one restrains further violative activity, the other seeks to determine whether it is in the public interest to exclude somebody from the securities business or to limit his activities in it. Far from being a barrier to administrative action, an injunction is an express and distinct ground for such action.[23]

VII. *PUBLIC INTEREST*

Respondent argues that the revocation and the bar imposed by the administrative judge are excessive and unwarranted. We disagree.[24] Sloan's violations are neither

trivial nor technical. They involve flagrant and long-continued breaches of significant duties imposed on persons in the securities business.[25]

Hence we find, as did the administrative judge, that it is in the public interest to revoke registrant's broker-dealer registration[26] and to bar Sloan himself from association with any broker or dealer. In arriving at that conclusion we have given some weight to the fact that in January of this year Sloan was again enjoined on our complaint. That second injunction:

> (A) Restrains Sloan from removing, destroying, or altering the books and records required by Section 17(a) of the Exchange Act and our rules thereunder;
>
> (B) Orders him to permit our staff to make an immediate examination of those records in an easily accessible place; and
>
> (C) Restrains him from initiating quotations for over-the-counter securities when he lacks the information required by our Rule 15c2-11 under Section 15(c)(2) of the Exchange Act.[27]

Sloan's own papers in the second injunctive suit show his continuing disposition to disregard or defy the rules governing registered broker-dealers. He glories in having submitted "more than 350" quotation applications "in the face of an admonition by the S.E.C. that the submission of these forms constituted a violation of its rules." And in an affidavit submitted to the Court of Appeals he has said:

> "I do not intend to comply with the . . . injunctive order. I am sure that both Judge Ward [the district judge] and the S.E.C. realize that this is the case. However, I would much prefer to have this matter decided . . . quickly so as to reduce the likelihood that I will actually be held in contempt. . . . Clearly, if I am actually held in contempt, I will suffer irreparable harm."[28]

An appropriate order will issue.

By the Commission (Chairman GARRETT and Commissioners LOOMIS, EVANS and SOMMER); Commissioner POLLACK not participating.

George A. Fitzsimmons
Secretary

FOOTNOTES

1. Registrant became registered with us in May 1970 as a partnership consisting of Sloan and another person. The other partner withdrew from the firm in January 1971, making Sloan its sole proprietor. Sloan thereafter sought to have registrant registered as a sole proprietorship, but this was not accomplished because of defective filings. Hence registrant is still carried on our records as a partnership although now wholly owned by Sloan. Accordingly, we shall for present purposes treat registrant as a sole proprietorship.

2. Briefs were filed with us by respondent and our Division of Enforcement. Our findings are based upon an independent review of the record.

3. *S.E.C. v. Sloan*, 71 Civil 2695. Respondent consented to the entry of the preliminary injunction, without either admitting or denying the allegations in our complaint.

4. The Securities Exchange Act (Sections 15(b)(5) and (7)) authorizes us to impose remedial sanctions if we find it in the public interest to do so and that any respondent (1) is permanently or temporarily enjoined by any court from engaging in any conduct in connection with broker-dealer activities or the purchase or sale of securities, or (2) has willfully violated any provision of the Exchange Act or rules thereunder.

5. Sloan's appeal from the permanent injunction was dismissed for want of prosecution on March 27, 1975. *S.E.C. v. Sloan*, Docket No. 74-1436 (C.A. 2).

6. The administrative law judge also found willful violations of the record-preservation provisions of our Rule 17a-4 under Section 17(a). We do not agree. We do not consider that the failure to preserve records, as required by Rule 17a-4, constitutes a separate and additional infraction once a violation has been found based upon a failure to make those same records, as required by Rule 17a-3. *L.C. Fisher Company, Inc.*, Securities Exchange Act Release No. 10259 (June 29, 1973), 2 SEC Docket 81.

7. Our inspector testified he was told respondent's accountant had them.

8. Sloan's claim that he gave our staff certain papers (a deposit slip, a trial balance, and a stock record) has no bearing on these deficiencies.

9. Net capital computations, as well as trial balances, are required by Rule 17a-3(11) to be "prepared currently at least once a month."

10. Ultimately, however, it obtained almost all of the trial balances it requested.

11. He found the following deficiencies on the dates set forth below:

1971	
Jan. 18	$28,016
Jan. 29,	11,912
Feb. 26	15,961
June 30	19,222
July 31	70,064
Aug. 31	15,789
Sept. 30	10,729
Oct. 8	7,545
Nov. 30	4,010
Dec. 31	4,557
1972	
Jan. 31	718

12. Respondent admits that his net capital was deficient during this period. He states that under his July 28 agreement with out staff "he was to be permitted *to correct his . . . net capital deficiencies* by conducting a limited securities business." (Emphasis added.)

13. Section 15(c)(3) prohibits a broker-dealer not only from effecting transactions, but from attempting to induce them, in contravention of our rules. Hence a securities dealer whose net capital is deficient is barred from inserting quotations in the sheets.

14. An act is "willful" within the meaning of that word as used in Section 15(b) of the Exchange Act even if the

actor does not intend to violate the law. The act which constitutes the violation is "willful" whenever the actor intends to do that which he did. *Tager v. S.E.C.*, 344 F.2d 5, 8 (1965); *Gearhart & Otis, Inc. v. S.E.C.*, 348 F.2d 798, 802-3 (1965).

15. We think it unnecessary to reach certain other net capital infractions alleged in the order for proceedings and found by the administrative judge.

16. Under Rule 17a-5, as then in effect, a broker-dealer was required to file his report of financial condition not more than 45 days after the date of the report. The rule further specified that the date of his first report should be from one to five months after his registration became effective. Since registrant became registered on May 10, 1970, he was required to file his report by November 1970. But he himself says it was not filed until March 1971.

Rule 17a-10 requires that a report of income and expenses and related information be filed not later than 120 days after the close of the calendar year. Although it was required to be filed by April 1971, respondent says he did not do so until December 1971.

17. Registrant also willfully violated Section 17(a) of the Exchange Act and our Rule 17a-11 thereunder from September 15, 1971 (the date on which that rule went into effect) until January of 1972. That rule requires that a broker-dealer give the Commission telegraphic notice of his net capital deficiency on the day it occurs and, within 24 hours, file a report of financial condition. The administrative judge found that registrant never furnished any such notice or report. And no exception has been taken to this finding.

18. 369 F. Supp. 996 (1974).

19. Among other things, the court found that since August 1973 (the opinion issued in January 1974) respondent had not made his books and records available for inspection by our staff, "although numerous efforts were made by the Commission to arrange such an in-

spection." It also found net capital violations in May and August 1973.

20. He also asserts that attorneys on our staff engaged in unprofessional conduct. But most of these charges relate to the injunctive proceedings. Hence they are irrelevant here. Nothing has been alleged that goes to the merits of the matter before us.

21. *Kamen & Company*, 43 S.E.C. 97, 108 n. 17 (1966); *A.G. Bellin Securities Corp.*, 39 S.E.C. 178, 186 (1959). See also *Lile & Co., Inc.*, 42 S.E.C. 664, 670 (1965). Compare *United States v. Kordell*, 397 U.S. 1, 11 (1970): "It would stultify enforcement of federal law to require a governmental agency . . . invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial."

22. See *Clinton Engines Corporation*, 41 S.E.C. 408, 412-413 (1963); *A.J. White & Co.*, Securiites Exchange Act Release No. 10645 (February 15, 1974), 3 SEC Docket 550.

23. Sections 15(b)(5) and (7) of the Exchange Act summarized in n. 4, *supra*.

Respondent argues that the text of the Exchange Act is of no moment because the whole thing is unconstitutional. It is not for us to pass on that. Having been instructed by Congress to administer the Act, we are constrained to assume that statute is valid unless and until the courts hold otherwise. See *Milton J. Wallace*, Securities Exchange Act Release No. 11252 (February 14, 1975), 6 SEC Docket 300, 301; *Mutual Fund Distributors, Inc.*, 41 S.E.C. 174, 181 (1962); *Walston & Co.*, 5 S.E.C. 112, 113 (1939). Nevertheless, we think it appropriate to note that respondent's constitutional contentions are nothing less than an attack on all federal administrative law since they assume that Congress cannot vest this and other federal agencies with quasi-legislative and quasi-judicial powers, and that respondent cites nothing (other than his own ideas about the Constitution) in support of this radical position. We also note that the Supreme Court seems to take a

different view. See *Butz v. Glover*, 411 U.S. 182 (1973) where the court cited with approval *Hiller v. S.E.C.*, 429 F.2d 856, 858-859 (C.A. 2, 1970) and *Dlugash v. S.E.C.*, 373 F.2d 107, 110 (C.A. 2, 1967). 411 U.S. at 187.

24. Respondent says that he rejected a settlement calling for a 60-day suspension suggested by our staff prior to the hearings. But the asserted willingness of our staff to recommend that we accept a 60-day suspension for purposes of settlement (only we, not our staff, can accept an offer of settlement—see Rule 8(a) of our Rules of Practice) is irrelevant. As we said in *Haight & Company*, 44 S.E.C. 481, 512-513 (1971), *affirmed without opinion* (C.A.D.C. June 30, 1971): "In settlement cases, where as a rule there is no admission of violations, we taken into account pragmatic considerations such as the avoidance of time-and-manpower-consuming adversary proceedings." Here, however, the record before us is fully developed. And it establishes various violations. *Cf. Security Planners Associates, Inc.*, 44 S.E.C. 738, 743-744 (1971). Sloan's idea that a settlement proposal by our staff sets some sort of a ceiling on the sanction that can be imposed after a record has been developed is fallacious. Such a rule would undermine the settlement process that the Administrative Procedure Act seeks to encourage. That statute provides that "The agency shall give all interested parties opportunity for—(1) the submission and consideration of . . . offers of settlement, or proposals of adjustment. . . ." 5 U.S.C. §554(c). See also *First Detroit Securities Corporation*, Securities Exchange Act Release No. 10706 (March 27, 1974), 3 SEC Docket 752, 753. If respondents were assured that a trial could never result in a sanction more severe than the one suggested by our staff in settlement discussions, they would have little, if any, incentive to settle. And even if we were otherwise inclined to give some slight weight to an abortive settlement proposal made by our staff, we could not properly do so in this case. Here we have facts and circumstances before us that were unknown to and could not possibly have been foreseen by our staff at the time of the settlement talks.

25. See *Blaise D'Antoni Associates, Inc. v. S.E.C.*, 289 F.2d 276, 277, (C.A. 5, 1961) ("The net capital rule is one of the most important weapons in the Commission's arsenal to protect investors."); *Fox Securities Company, Inc.*, Securities Exchange Act Release No. 10475, 2 SEC Docket 667, 669 (November 1, 1973) ("accurate and current records are essential to enable a broker-dealer to determine compliance with the net capital and other requirements."); *Wanda O. Olds*, 37 S.E.C. 23, 26 (1956) ("The requirements that books be kept current and financial reports be filed on time and in proper form are important"); *Scientific Investors Corporation*, 41 S.E.C. 618, 619 (1963) ("Reports are important not only to inform investors but because they may open avenues of inquiry which may well lead to collateral information having a direct bearing upon the broker-dealer's compliance with other rules of the Commission).

26. We therefore deny his request for withdrawal of registrant's broker-dealer registration.

27. *S.E.C. v. Sloan*, 74 Civil 5729 (U.S.D.C., S.D.-N.Y.). Sloan's appeal from the second injunction is pending before the United States Court of Appeals for the Second Circuit. Yet the fact remains that a court of competent jurisdiction found the second injunction appropriate and that it did so over Sloan's vehement opposition. That is a circumstance to be considered in assessing the requirements of the public interest. Compare *Summit Equities Corp.*, Securities Exchange Act Release No. 10366 (August 28, 1973), 2 SEC Docket 347.

28. The affidavit in which this statement appears was made in support of Sloan's unsuccessful application for a stay of the second injunction. Sloan's earlier petition to the Court of Appeals for a writ of mandamus against the district judge is in the same vein. After stating that "the S.E.C. has known . . . that the petitioner was not going to make his books and records readily available," he goes on to say: "It is no secret that the petitioner has not paid . . . any . . . S.E.C. assessment in more than two years. It is no secret that the petitioner has not filed any financial statements with the S.E.C. for two years."

APPENDIX F

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 11376/April 28, 1975

Admin. Proc. File No. 3-3680

In the Matter of

SAMUEL H. SLOAN
doing business as SAMUEL H. SLOAN & CO. 120 Liberty Street New York, New York (8-15750)

ORDER IMPOSING REMEDIAL SANCTIONS

Proceedings were instituted under the Securities Exchange Act to determine what, if any, remedial action is appropriate in the public interest with respect to Samuel H. Sloan, doing business as Samuel H. Sloan & Co.

Hearings were held before an administrative law judge. He submitted an initial decision. Respondent's petition for review was granted, and briefs were filed by him and by the Commission's Division of Enforcement. Respondent requested withdrawal of the broker-dealer registration of Samuel H. Sloan & Co.

The Commission has this day issued its Findings and Opinion. On the basis of such Findings and Opinion, it is

ORDERED that the request for withdrawal of the registration of Samuel H. Sloan & Co. as a broker and dealer be, and it hereby is, denied; and it is further

ORDERED that the aforesaid broker-dealer registration

be, and it hereby is, revoked; and it is further

ORDERED that Samuel H. Sloan be, and he hereby is, barred from being associated with any broker or dealer.

By the Commission.

s/ George A. Fitzsimmons
George A. Fitzsimmons
Secretary

APPENDIX G

UNITED STATES COURT OF APPEALS

For the Second Circuit

Nos. 36 and 266—September Term, 1976.

(Argued October 13, 1976 Decided November 18, 1976.)

Docket Nos. 75-4087 and 76-4110

Samuel H. Sloan d/b/a Samuel H. Sloan & Co.,

Petitioner,

v.

Securities and Exchange Commission, Ray Garrett, Jr., Philip A. Loomis, Jr., John R. Evans, A. A. Sommer, Jr., George A. Fitzsimmons,

Respondents.

Samuel H. Sloan,

Petitioner,

v.

Securities & Exchange Commission,

Respondent.

Before:

Medina, Anderson and Gurfein,

Circuit Judges.

Petitions for review of S.E.C. order revoking broker-dealer registration and barring petitioner from association with any broker or dealer (Case No. 75-4087), and for review of the validity of a series of S.E.C. orders suspending trading in the stock of a certain corporation (Case No. 76-4110). S.E.C. orders affirmed in Case No. 75-4087, and declared invalid, except for the first order, in Case No. 76-4110.

Samuel H. Sloan, *Pro Se*, Bronx, New York.

David Ferber, Solicitor to the Commission and Frederick B. Wade, Esq., Securities and Exchange Commission, Washington, D. C., *for Respondents.*

Anderson, *Circuit Judge:*

Case No. 75-4087

This is the appellant Samuel H. Sloan's latest maneuver in his long struggle to avoid compliance with the Securities and Exchange Act and disciplinary measures brought by the S.E.C.[1] He is now seeking a review of the order of the Commission, dated April 28, 1975, revoking the broker-dealer registration of Samuel H. Sloan d/b/a Samuel H. Sloan & Co., and barring him from associating with any broker or dealer.

He argues, *inter alia*, that his constitutional rights were violated when the SEC refused to let him withdraw his broker-dealer registration as Sloan & Co., which he attempted to do as soon as the SEC took the first steps to revoke the license. As authority for his right to do this he cites *Jones v. SEC*, 298 U.S. 1 (1936). But that case dealt with the withdrawal as a matter of right, under the Securities Act of 1933, of a *registration statement* con-

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1 A history of Sloan's litigation with the S.E.C. is set out in this court's opinions in *Sloan v. SEC*, slip op. 2377, 2379, and nn. 2, 3 (2d Cir. March 4, 1976), and *SEC v. Sloan*, slip op. 3655, 3676 (2d Cir. May 10, 1976).

cerning *securities*. It had nothing whatever to do with a broker-dealer licensing registration.

The petitioner declares that §15(b) of the Securities Exchange Act of 1934 is a criminal statute, which makes broker-dealers inherently suspect with respect to criminal activities. He, therefore, asserts that a statutory or regulatory provision which requires them to furnish information about activities which have been made criminal under some provision of the Act, in effect, compels them to testify against themselves. He equates his own case with *Leary* v. *United States*, 395 U.S. 6 (1969), and *Marchetti* v. *United States*, 390 U.S. 39, 47 (1968), where respectively (a) disclosure of possession of marihuana or (b) wagering activities for tax purposes exposed the taxpayer to prosecution under state and federal laws. The argument, of course, has no bearing on the present case because the applicable statute with which the case is concerned is not criminal but clearly regulatory in nature. The Supreme Court carefully pointed up this distinction in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 79 (1965).

The petitioner also complains that his Fifth Amendment right to notice and a hearing and his Sixth Amendment right to be informed of the nature of the charges against him were violated. It appears from the record that the proceedings by the SEC against Sloan were commenced on April 25, 1972 by mailing to Sloan a three page order for public proceedings. Petitioner does not claim that he did not receive them, and he in fact appeared through his counsel. Although he received notice, he goes on to complain that the order did not give him a sufficiently full or definite statement of the "nature and the cause of the accusations against him." An examination of the Order for Public Proceedings, however, discloses that the allegations against Sloan were made with great particularity and in detail so that he was fully apprised of the claims made

against him; he knew what the nature of the charges was, against which he had to defend himself.

He complains that the order was not signed or verified in accordance with Rule 11, C.R.F.P. and asserts that the S.E.C. was required to have specially pleaded allegations of fraud. But administrative proceedings are not bound to follow the Federal Rules of Civil Procedure.

Among other things the petitioner challenges the constitutionality of the Act itself, as he has done on numerous occasions in other actions. These former attacks[2] were characterized by this court as "frivolous," and we are of the opinion that the present claims are equally so.

The remaining points sought to be raised by the petitioner have no merit and call for no comment. Moreover, prior to the revocation of Sloan's license by the S.E.C., the United States District Court for the Southern District of New York had issued a preliminary injunction, which it subsequently made permanent, ordering Sloan to discontinue his violations of the S.E.C. rules relating to record keeping and net capital. This court dismissed an appeal from the granting of this injunction. *S.E.C.* v. *Sloan*, 538 F.2d 313 (2d Cir. 1976). Thereafter the same district court issued another preliminary injunction on January 17, 1975, prohibiting Sloan from submitting quotations of over-the-counter transactions to "the pink sheets." This court dismissed an appeal from this preliminary injunction on January 7, 1976. *S.E.C.* v. *Sloan*, *supra*. Each of these injunctions was in itself a sufficient ground to support the revocation of Sloan's broker-dealer license under §15(b)5e of the 1934 Act.

The orders of the S.E.C. are affirmed.

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2 See *Sloan* v. *SEC*, sl p op. 2377, 2380 (2d Cir. March 4, 1976).

Case No. 76-4110

In an appeal brought by the petitioner Sloan from a series of ten-day suspension orders imposed by the S.E.C. upon the stock of Canadian Javelin, Ltd (CJL), a Canadian corporation, in which Sloan had extensive dealings (principally in selling the stock short), this court handed down a decision on October 15, 1975, *Sloan v. Securities & Exchange Commission*, 527 F.2d 11 (2 Cir. 1975), *cert. denied* —— U.S. —— (June 14, 1976), in which it stated that the questions raised were frivolous except for the petitioner's allegation that the "'tacking' of ten-day summary suspension orders by the SEC for an indefinite period constitutes an abuse of that agency's authority and a deprivation of due process. Apparently this question has never been judicially considered and would seem not to be frivolous . . . ." 527 F.2d at 12. The pleadings in the case then on appeal concerned only the first of a series of ten-day suspension orders which ran from November 29, 1973 through January 26, 1975. At the time the appeal was actually heard, however, a second series of ten-day suspension orders was in progress which ran from April 29, 1975 through May 2, 1976. This court was of the opinion that in the absence of any record dealing with this second series of suspensions, it was not in a position to decide whether the second series was based on substantial evidence or if it constituted an abuse of discretion by the S.E.C. Another factor which this court noted was that the applicable statute had been amended on June 4, 1975 and the relevant sections are now §§12(j) and (k) of the 1934 Act, 15 U.S.C. §§78*l*(j) and (k).[3] The amended stat-

3 Sections 78*l* (j) and (k) read as follows:

"(j) The Commission is authorized by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security if the Commis-

ute applies to that portion of the second series of ten-day suspension orders issued between June 4, 1975 and May 2, 1976.

In the course of its argument before this court on the prior appeal, the S.E.C., though it did not say that any statute or regulation required it, offered to grant petitioner Sloan "some sort of administrative hearing." The court noted that this would satisfy any possible exhaustion requirement and would at the same time fill out the record which the court found to be "insurmountably sparse." In the light of this development, the court dismissed Sloan's appeal without prejudice to his repleading after an administrative hearing before the SEC from which judicial review might be sought.

This decision was filed on October 15, 1975 and Sloan immediately petitioned the S.E.C. for the promised hearing. The Commission rejected his petition because it was not verified or properly formulated. On March 11, 1976 Sloan filed a new and verified petition to the Commission, demanding the hearing and requesting a declaration that the

sion finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of this chapter or the rules and regulations thereunder. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence.

(k) If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading in any security (other than an exempted security) for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange or otherwise, in securities other than exempted securities, for a period not exceeding ninety days. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in which trading is so suspended."

successive orders of suspension were illegal, that they violated his due process rights and the Securities Exchange Act. The decision of the Commission rejecting Sloan's petition and refusing to give him the above mentioned administrative hearing was handed down on April 21, 1976, long after the effective date of the amended statute and while the second series of ten-day suspension orders was still being issued. Thereafter on April 23, 1976 and during the time the April 21, 1976 suspension order was operating, Sloan brought the present appeal pursuant to §25(a) of the 1934 Act, 15 U.S.C. §78y(a)(1) (as amended, 1975), for review of this second series of suspension orders. He alleges (1) that there was no rational basis for the trading suspensions and the orders were not supported by substantial evidence; (2) that the suspension orders violated his due process rights because at no time has he been afforded notice and an opportunity for a hearing; (3) that the successive summary suspension orders, the "tacking" of ten-day orders, are unlawful because the statute specifically authorizes summary suspension of trading only "for a period not exceeding ten days"; (4) that §78*l*(k) is an unconstitutional delegation of Congress' legislative power because a suspension of trading in a security is "legislation"; and (5) that the present proceeding is not moot even though there are no suspension orders now in effect.

With respect to the first of these claims, an examination of the record discloses there was sufficient evidence of probable manipulation of CJL's common stock and of the false and fraudulent representations as to its soundness and value to justify the Commission's conclusion that the public interest and the protection of investors required it summarily to suspend trading "for a period not exceeding ten days" in accordance with both the previous sections, 19(a)(4) and 15(c)(5), as well as the new section

12(k), and the Commission, therefore, suspended trading of the stock for ten days commencing April 29, 1975.

At the end of this first ten-day suspension period, the Commission decided that under the circumstances the suspension order should be continued for an additional ten days. It asserts that it did this on the basis of an independent determination made at the time that continued suspension was required in the public interest and for the protection of investors. At the end of the second ten-day suspension period, it made a like determination and ordered a further ten-day suspension and then made another determination and order and another and another until the total suspension periods covered a span of 370 days or 37 ten-day suspension periods. In spite of the wording of the statute, both before and after the amendment of 1975, which authorized suspension "for a period not exceeding ten days," the Commission made its own interpretation of the statute through which it claimed to have the power to order any number of ten-day suspension periods which could total many months or even years. It relies in some measure upon legislative history which concerned the earlier act, i.e., Securities & Exchange Act of 1934, §15(c)(5) and §19(a)(4), 15 U.S.C. §78o(c)(5) and §78s(a)(4), to support the legality of such tacking of ten-day orders. Although a few comments by individual senators and congressmen indicated that they were aware that the S.E.C. was using successive ten-day suspension orders for periods of extended duration, no express statutory authority for this procedure was ever enacted. The Commission further claims that the practice of roll-over ten-day suspension orders, which developed before the 1975 amendment, was carried over to the newly amended law of June 4, 1975, because Senate Report No. 94-75, 94th Cong., 1st Sess. (1975), p. 106, stated that the proposed §12(k) "would consolidate in one place the power the SEC presently has

to . . ." issue summary trading suspension orders. We disagree, however, with the Commission's rather free interpretation of the statute and its claims as to the legislative intent.

Section 12(k) of the 1975 amended statute, was a consolidation of the prior sections 15(c)(5) and 19(a)(4). It authorized the SEC to issue summary suspension orders, but it did not empower the Commission to adopt the arbitrary practice of issuing a string of successive ten-day suspension orders such as those promulgated in the present case. More revealing of congressional intent is the paragraph concerning subsection (j) in Senate Report No. 94-75, *supra*, at 105-106, which recites the authority the SEC has "to suspend for a period not exceeding twelve months [n.b. not a summary suspension] . . . after notice and opportunity for hearing . . ." if the Commission finds

> "that the issuer of such security has failed to comply with any provision of the Exchange Act or the rules and regulations thereunder. It would also make unlawful any trading in any such security by any broker or dealer. *With this change, the Commission is expected to use this section rather than its ten-day suspension power in cases of extended duration.*" (Emphasis added.)

This discussion immediately preceded the summary suspension power granted the Commission in subsection (k) and must be read in conjunction with it in determining congressional intent. It must also be borne in mind that the amended statute, as did its predecessor, also provides for an additional summary suspension procedure for a period between the "not exceeding ten day" suspension power and the "not exceeding twelve months" suspension power, and that is, in subsection (k) where the Commis-

sion is authorized "with the approval of the President, summarily to suspend all trading on a national securities exchange or otherwise, in securities other than exempted securities, for a period not exceeding *ninety* days." (Emphasis added.) It is clear that the congressional scheme for empowering the SEC to suspend trading in a stock or stocks for specified periods, authorized summary action for ten days and/or ninety days to meet emergency situations, to protect the public interest and afford protection of investors. For suspensions required for periods in excess of ninety days but not in excess of twelve months, a notice and a hearing prior to suspension are required. It was also clearly a part of the congressional scheme that the power to order ten-day suspensions was not to be used in cases of extended duration, that is to say they should not be used as a substitute for a period between ten and ninety days or for any time in excess of ninety days, such as in the present case where the suspensions ran on for more than a year.

The petitioner also claims that his constitutional rights were violated by the series of suspension orders because he was never afforded notice and an opportunity for a hearing. It is not necessary to deal with this point as a constitutional violation, however, because the procedures adopted by the SEC plainly transgressed the statutory provisions. For a single ten-day suspension no prior notice or hearing is required because the proceeding is summary in nature and because the emergency aspect of the order, issued to protect the public interest and give protection to investors, makes it necessary. Likewise, a suspension of ninety days or less is a summary proceeding, safeguarded by the prerequisite of presidential approval. The total period of successive suspensions in this case, however, ran for almost eleven months from the effective date of the

amended act, June 4, 1975. Certainly the statute contemplates that for so long a period of ordered suspension in trading of a particular stock, a person aggrieved by the order should be afforded notice and a hearing as soon as it appears that the suspension will probably exceed ninety days.

The only remaining point advanced by the petitioner on appeal, which requires some comment, is the issue of mootness raised by the SEC, which asserts that since May 2, 1976, there has been no ten-day suspension order as to trading of CJL stock, that there are no plans on the part of the SEC to consider or to issue one and no real likelihood that one will be issued in the foreseeable future.

The petitioner claims that he has suffered great loss and damage because the suspension orders frustrated his trade in CJL stock, including short sales, and that each succeeding ten-day suspension expired before he could seek a legal review of the validity of the order.[4] Because of the SEC's continuing policy of roll-over ten-day suspension orders, the harm to him was "capable of repetition yet evading review." *Southern Pacific Terminal Co.* v. *ICC*,

---

4 This court in its October 15, 1975 decision in Sloan's prior case found that the petitioner had standing, as one aggrieved. At the time he filed his petition in that case he was a trader-dealer doing business under the name of Samuel H. Sloan & Co. He dealt in several different corporate stocks, including the common stock of Canadian Javelin, Ltd., a Canadian corporation. As an individual he owned thirteen shares of Javelin common stock. On April 28, 1975 the S.E.C. revoked his registration and license, so that for the remainder of the time within which this case is concerned, Sloan was not licensed to trade.

We are of the opinion that his private ownership of the common shares is sufficient to confer standing on the petitioner to ask for a review in this case under 15 U.S.C. §78(y) within 60 days of the S.E.C.'s promulgation of its order. *Medical Committee for Human Rights* v. *S.E.C.*, 432 F.2d 659, 667 (D.C. Cir. 1970). The effect of the suspension order on Sloan, an existing shareholder, is equivalent to an injunction preventing him from selling his shares. He, therefore, has standing. We do not pass on whether individual shareholders have standing in other types of SEC proceedings.

219 U.S. 498 (1911); *Sosna* v. *Iowa*, 419 U.S. 393 (1975). See also *Weinstein* v. *Bradford*, 423 U.S. 147 (1975).

This petition for review was filed before the expiration of the last ten-day suspension of the second series now before us for consideration. Moreover the petitioner had raised the question before this court in connection with its October 15, 1975 decision and again before the SEC in connection with the present case. We declare that the successive roll-over ten-day suspension procedure erroneously adopted by the SEC was improperly pursued and was contrary to the statutory provisions for summary suspensions in force April 30, 1975 to May 2, 1976. The issue of statutory construction and interpretation never became moot and has been ruled upon in this review. The SEC is, therefore, directed to discontinue forthwith its adoption and use of successive ten-day suspension orders to order the suspension of trading in a security for an extended period, i.e. in excess of ten days.

It is so ordered.

APPENDIX H

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 36, 266—September Term, 1976.

(Petition Decided December 27, 1976.)

Docket Nos. 75-4087, 76-4110

SAMUEL H. SLOAN,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Before:

MEDINA, ANDERSON and GURFEIN,

Circuit Judges.

ON REHEARING

PER CURIAM:

The petition in this case by the Securities and Exchange Commission for a rehearing on the decision by this court on November 18, 1976 ". . . insofar as it deals with the Commission's authority to issue successive summary trading suspensions . . ." is denied.

In the course of reviewing the appeal, the briefs of the parties and the opinion and judgment of the court, this court arrived at the conclusion that the portions of the memorandum of decision which discussed the 90-day suspension provision of 15 U.S.C. §78(k) should be excised from the opinion and revoked as having had no constituent

part in the holding in the case.[1] It was included as a part of the legislative framework of the Act as it dealt with suspension of trading in securities on a national exchange. It is not necessary to the decision in the case; and, in view of the variety of implications and interpretations which may be and have been made of the 90-day suspension provision, the court has concluded it should best be deleted. The memorandum of decision of November 18, 1976 is therefore amended accordingly.

The judgment of this court is reaffirmed in all other respects.

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1 The portions of the court's opinion to be excised are: Slip opinion of November 18, 1976, at the bottom of page 563, the sentence commencing with the words, "It must also be borne in mind that . . ." through the next two sentences on page 564 beginning with the words, "It is clear . . ." through the words, ". . . prior to suspension are required." From the following sentence "it was also clearly . . ." delete the word "also"; and in the same sentence excise the clause beginning with the words, ". . ., that is to say . . ." and ending ". . . excess of ninety days."

Also excise the three sentences from and including the second sentence from the bottom of page 564, beginning "Likewise, a suspension" and including the next two sentences through to the end of the paragraph ending at the top of page 565 with the words, ". . . exceeding ninety days."

That portion of the opinion will now read:

> "This discussion immediately preceded the summary suspension power granted the Commission in subsection (k) and must be read in conjunction with it in determining congressional intent. It was clearly a part of the congressional scheme that the power to order ten-day suspensions was not to be used in cases of extended duration, such as in the present case where the suspensions ran on for more than a year.
>
> The petitioner also claims that his constitutional rights were violated by the series of suspension orders because he was never afforded notice and an opportunity for a hearing. It is not necessary to deal with this point as a constitutional violation, however, because the procedures adopted by the SEC plainly transgressed the statutory provisions. For a single ten-day suspension no prior notice or hearing is required because the proceeding is summary in nature and because the emergency aspect of the order, issued to protect the public interest and give protection to investors, makes it necessary.
>
> The only remaining point . . ."

APPENDIX I

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fourth day of January, one thousand nine hundred and seventy-seven.

SAMUEL H. SLOAN, d/b/a SAMUEL H. SLOAN & COMPANY,

Petitioner,

v.

SECURITIES & EXCHANGE COMMISSION, et al.,

Respondents.

Docket No. 75-4087

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by the petitioner (pro se), and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ Irving R. Kaufman
IRVING R. KAUFMAN,
Chief Judge

APPENDIX J

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fourth day of January, one thousand nine hundred and seventy-seven.

SAMUEL H. SLOAN, d/b/a SAMUEL H. SLOAN & COMPANY,

Petitioner,

v.

SECURITIES & EXCHANGE COMMISSION, et al.,

Respondents.

Docket No. 75-4087

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the respondent (S.E.C.), and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ Irving R. Kaufman
IRVING R. KAUFMAN, Chief Judge

APPENDIX K

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
APR 29 1975

In the Matter of Trading in Securities
of
CANADIAN JAVELIN, LTD.
File No. 500-1

Securities Exchange Act of 1934
Section 19(a)(4) and 15(c)(5)

NOTICE OF SUSPENSION OF TRADING

The common stock of Canadian Javelin, Ltd. being traded on the American Stock Exchange pursuant to provisions of the Securities Exchange Act of 1934 and all other securities of Canadian Javelin, Ltd. being traded otherwise than on a national securities exchange; and

It appearing to the Securities and Exchange Commission that the summary suspension of trading in such securities on such exchange and otherwise than on a national securities exchange is required in the public interest and for the protection of investors;

THEREFORE, pursuant to Sections 19(a)(4) and 15(c)(5) of the Securities Exchange Act of 1934, trading in such securities on the above mentioned exchange and otherwise than on a national securities exchange is suspended, for the period from 3:45 P.M. (EDT) on April 29, 1975 through midnight (EDT) on May 8, 1975.

By the Commission.

s/ George A. Fitzsimmons
George A. Fitzsimmons
Secretary

APPENDIX L

INFORMATIONAL MEMORANDUM

May 2, 1975

TO: The Commission
FROM: Division of Enforcement
SUBJECT: Canadian Javelin Limited
HO-815

On April 29, 1975, [redacted] the Commission approved a 10 day suspension of trading in the common stock of Canadian Javelin Limited ("Canadian Javelin") and issued an order of investigation concerning allegations of manipulative activities by insiders of Canadian Javelin.

The staff informed the Commission that the Royal Canadian Mounted Police ("RCMP") advised that they are conducting an extensive investigation into what they believe to be a manipulation of Canadian Javelin's common stock on several Canadian stock exchanges as well as the American Stock Exchange. They have also indicated that several United States residents and broker-dealers may also be involved in the manipulation.

The trading suspension was prompted by the RCMP's having informed us that they were in the process of executing more than 40 search warrants in connection with their investigation of this matter. The suspension was sought pending an announcement by Canadian Javelin concerning the investigation by the Canadian authorities.

DPDoherty, Assistant Director	(x 51246)
RGRyan, Branch Chief	(x 51469)
JILevine, Special Investigator	(x 51468)

APPENDIX M

	Trial Bal. Jan. 18, 1971	*Market Value Securities*		*Trial Assets Liabilities*	
Assets					
CURRENT					
Cash in Bank	5,716.98				
Acct. Receivable	982.22				
Fails to Deliver	25,043.46		31,742.66		
Trading Account Long	6,521.94		4,883.28	32,625.94	
NON CURRENT					
Rect's & Disbursements Related to Costs	460.63				
Rects, Deliveries to Customers	9,851.25				
Operating Expenses	5,135.05				
	53,711.53				
Liabilities					
Unaccounted for (Diff)	10,043.90				
Receipts, Payments a/c Customers	11,010.13				
Fail to Receive	7,317.01		A.I.	28,371.04	
Fail to Receive Inventory	2,192.50			2,192.50	
Firm Trading Short	15,924.79			20,728.75	51,292.29
Comm. Income	141.25				
Sam H. Sloan Capital	7,081.95				
	53,711.53			Net Current Cap. Deficit	(14,666.35)
	Fail Penalty		666.75		
	Long Val.	4,883.28			
	Short "	20,728.75			
	30% of	25,612.03	7,683.60		
			8,350.35		8,350.35
				ARI Net Capital (Deficit)	(23,016.70)
				Required Margin	5,000.00
				To Comply With Capital Requirements	28,016.70

A.I. 28,371.04
1/2 1,418.55

No. 76-1547

In the Supreme Court of the United States

OCTOBER TERM, 1977

SAMUEL H. SLOAN AND SAMUEL H. SLOAN D/B/A SAMUEL H. SLOAN & CO., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

DAVID FERBER,
Solicitor,

FREDERICK B. WADE,
Special Counsel,
Securities and Exchange Commission,
Washington, D.C. 20549.

In the Supreme Court of the United States

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SAMUEL H. SLOAN AND SAMUEL H. SLOAN D/B/A SAMUEL H. SLOAN & CO., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 38a-49a), as modified (Pet. App. 50a-51a), is reported at 547 F. 2d 152. The opinion of the Securities and Exchange Commission (Pet. App. 23a-35a) is reported in Securities Exchange Act Release No. 11376 (April 28, 1975), 6 SEC Docket 772.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1976, and a petition for rehearing was denied on January 24, 1977. On May 4, 1977, Mr. Justice Marshall extended the time in which to file a petition for

a writ of certiorari to and including May 15, 1977. The petition was filed on May 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were given adequate notice and opportunity for hearing prior to Sloan & Co.'s registration being revoked and petitioner Sloan being barred from association with other brokers or dealers.

2. Whether the Commission properly concluded that such revocation and bar were in the public interest.

3. Whether petitioner Sloan & Co. had an absolute right to withdraw its broker-dealer registration prior to revocation of the registration by the Commission.

4. Whether the Securities Exchange Act of 1934 authorizes the Commission to prohibit petitioner Sloan for more than twelve months from being associated with other brokers or dealers.

5. Whether the Commission's suspension of trading in the stock of Canadian Javelin, Ltd. was supported by substantial evidence.

STATUTES AND RULES INVOLVED

The statutes and rules involved in the instant case are set forth at Pet. 8-25.

STATEMENT

After an evidentiary hearing and full administrative proceedings, the Securities and Exchange Commission found (Pet. App. 23a-29a) that petitioner Samuel H. Sloan & Co., a registered broker-dealer, (1) had willfully violated various provisions of the Securities Exchange Act of 1934 (48 Stat. 881, as amended, 15 U.S.C. 78a *et seq.*) and the Commission's rules and regulations thereunder (17 C.F.R.

Part 240), and (2) had been enjoined from violating certain of those provisions. The Commission revoked the registration of Sloan & Co. and prohibited its sole proprietor, petitioner Samuel H. Sloan, from being associated with any broker or dealer (Pet. App. 36a-37a).

The Commission, affirming the administrative law judge, ruled that Sloan & Co. had committed the following violations:

1. It "willfully violated the recordkeeping provisions of Section 17(a) of the [Securities] Exchange Act and Rule 17a-3 thereunder" by committing "extensive and persistent recordkeeping" violations during the first eight months of 1971 (Pet. App. 24a-25a).

2. It willfully violated the net capital requirements in Section 15(c)(3) of the Act, 15 U.S.C. 78*o*(c)(3), and Rule 15c3-1 thereunder (Pet. App. 26a).[1]

[1]The administrative law judge had found that net capital deficiencies ranging from $718 to $70,064 existed on eleven separate dates between January 18, 1971, and January 31, 1972 (Pet. App. 26a, 31a n. 11). Noting that Sloan did not challenge these findings in his appeal to the Commission, but merely challenged the finding that he had engaged in business between the end of July and September 1971 (Pet. App. 26a), the Commission stated (*ibid.*):

> Sloan's own testimony shows that he engaged in the securities business * * * from January to July 28, 1971. And in January of 1972 he inserted quotations for various securities in the * * * [quotation listings] published by the National Quotation Bureau, Inc.

Thus, without reaching the question whether Sloan & Co. violated the net capital requirements between July 28, 1971 and January, 1972, the Commission found that it violated those requirements "in January, February, June and July, 1971, and January of 1972" (*ibid.*; footnote omitted).

3. It willfully violated Section 17(a) of the Act, 15 U.S.C. 78q(a), and Rules 17a-5 and 17a-10 by failing to file with the agency within the prescribed times a Rule 17a-5 report of financial condition for 1970 and a Rule 17a-10 report of income and expenses for the same year (Pet. App. 26a-27a), and willfully violated Rule 17a-11 by failing to give the Commission telegraphic notice of the firm's net capital deficiency on the day it occurred and by failing to file a report of financial condition with the Commission within 24 hours thereafter (*id.* at 32a n. 17).

In revoking Sloan & Co.'s registration and barring Sloan from being associated with any other broker or dealer, the Commission concluded that the violations it had found were "neither trivial nor technical. They involve flagrant and long-continued breaches of significant duties imposed on persons in the securities business" (Pet. App. 27a-28a). The Commission noted that prior to the initiation of its administrative proceedings, the United States District Court for the Southern District of New York, in a suit the Commission had brought, had enjoined Sloan & Co. from operating as a broker-dealer while in violation of the net capital rules, and from violating the recordkeeping requirements (*id.* at 3a, 10a-11a, 27a), that the preliminary injunction had "become permanent" and that the permanent injunction, "unlike the preliminary one, was entered after a trial" (*id.* at 27a). The Commission also gave "some weight to the fact" that Sloan had also been preliminarily enjoined in a second Commission enforcement action from additional violations of the Act and the Rules, and noted that "Sloan's own papers in the second injunctive suit show his continuing disposition to disregard or defy the rules governing registered broker-dealers" (*id.* at 28a) and that Sloan had stated, in an affidavit filed in the court of appeals, that he did " 'not intend to comply with the * * * injunctive order' " (*ibid.*).

The court of appeals affirmed the Commission's actions (Pet. App. 39a-41a). It also held, in a separate appeal by petitioners (Docket No. 76-4110), that a Commission order suspending trading in the common stock of Canadian Javelin, Ltd. for ten days was valid (Pet. App. 44a-45a).[2]

ARGUMENT

The 70-page petition challenges the Commission's order on numerous grounds involving constitutional, statutory and evidentiary claims. The court of appeals correctly rejected these claims, and they present no issue warranting further review. As the court correctly concluded, petitioners' constitutional attacks upon the statute are frivolous, and most of their points "have no merit and call for no comment" (Pet. App. 41a).

1. Petitioners contend (Pet. 34, 39-40) that they did not receive adequate notice that the Commission would rely upon the permanent injunction and the second preliminary injunction, or upon Sloan's affidavit in the court of appeals. The order instituting the administrative proceedings, however, alleged that Sloan had been preliminarily enjoined from operating as a broker-dealer at a time when Sloan & Co. was "not in compliance with Sections 15(c)(3) and 17(a) of the [Securities] Exchange Act and Rules 15c3-1, 17a-3 and 17a-4 thereunder" (Pet. App. 3a).

The statute, in Section 15(b)(5) and (7), permitted the Commission to revoke the registration of any broker-dealer or to bar any person from being associated with a

[2] The court of appeals further held that under the statute the Commission cannot impose successive ten-day suspensions of trading in a stock. The Commission has filed a petition for a writ of certiorari (No. 76-1607) challenging that ruling. That issue is distinct from any of the issues petitioners raise.

broker or dealer who has been "permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as * * * [a] broker, or dealer."[3]

Although in determining the remedy the Commission also took into consideration occurrences subsequent to the order initiating the proceedings (see Pet. 34-35), these consisted of the indisputable facts that the preliminary injunction referred to in that order had become permanent, that a further injunction had been entered and that a statement had been made by petitioner Sloan in an affidavit filed in the court of appeals in the latter case (see Pet. App. 27a-29a). Petitioners do not show how more explicit notice would have enabled them to refute these facts.[4]

2. Petitioners argue at length (Pet. 38-39, 41-63) that the Commission's findings that Sloan & Co. willfully violated the Act and the Rules, and that the public interest required that Sloan & Co.'s registration be revoked and that Sloan be barred from being associated with any broker or dealer, are not supported by substantial evidence. These purely factual issues do not warrant further review. Moreover, each of the injunctions entered by the district court itself was, as the court of appeals noted, "a sufficient ground to support the revocation of Sloan's broker-dealer license * * * " (Pet. App. 41a).

[3]Comparable provisions are now contained in Section 15(b)(4) and (6), 15 U.S.C. (Supp. V) 78*o*(b)(4) and (6).

[4]Although petitioners contend that they did not receive adequate notice of and opportunity for hearing on the violations charged, the court of appeals correctly held that the notice initiating the administrative proceedings detailed petitioners' violations "with great particularity and in detail" (Pet. App. 40a-41a). Petitioners also had a full evidentiary hearing (Pet. App. 10a).

3. Petitioners also contend (Pet. 34) "that under constitutional principles set forth in *Jones* v. *S.E.C.*, 298 U.S. 1 (1936) * * * Sloan & Co. had an absolute right to withdraw its broker dealer registration" prior to a Commission decision to revoke that registration. *Jones* dealt, however, with the withdrawal of a registration statement under the Securities Act of 1933. As the court of appeals pointed out (Pet. App. 40a), "[i]t had nothing whatever to do with a broker-dealer licensing registration." Petitioner Sloan & Co. had no absolute right to withdraw its registration; the Commission's authority to revoke registration is an important element of the regulatory scheme, since " '[t]here is quite a distinction in the position of one who could say, "I resigned" and one who says, "I was expelled." ' " *Peoples Securities Co.* v. *Securities and Exchange Commission*, 289 F. 2d 268, 275 (C.A. 5); see also *Blaise D'Antoni & Associates, Inc.* v. *Securities and Exchange Commission*, 289 F. 2d 276 (C.A. 5), rehearing denied, 290 F. 2d 688, certiorari denied, 368 U.S. 899.

4. Petitioners assert (Pet. 33) that under the statute the Commission's prohibition against Sloan's association with any broker or dealer cannot exceed twelve months. They rely upon (Pet. 11) the language in Section 15(b)(7) of the Act, 15 U.S.C. 78*o*(b)(7), which authorizes the Commission to "bar or suspend for a period not exceeding twelve months any person from being associated with a broker or dealer." The words "for a period not exceeding twelve months" modify the word "suspend" and not, as petitioner contends, the word "bar." Under petitioners' interpretation, the word "suspend" would be surplusage. Other courts of appeals

have recognized that the Commission may bar such association for more than twelve months.[5]

5. With respect to the Commission's order suspending trading in Canadian Javelin stock for ten days, the court of appeals held (Pet. App. 44a) that "an examination of the record discloses there was sufficient evidence of probable manipulation of CJL's common stock and of the false and fraudulent representations as to its soundness and value to justify the Commission's conclusion that the public interest and the protection of investors required it summarily to suspend trading." There is no occasion for further review of that factual determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

DAVID FERBER,
Solicitor,

FREDERICK B. WADE,
Special Counsel,
Securities and Exchange Commission.

JULY 1977.

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[5]See, *e.g.*, *Hanly* v. *Securities and Exchange Commission*, 415 F. 2d 589, 597-598 (C.A. 2); *Fink* v. *Securities and Exchange Commission*, 417 F. 2d 1058, 1059-1060 (C.A. 2); *Nees* v. *Securities and Exchange Commission*, 414 F. 2d 211 (C.A. 9); *O'Leary* v. *Securities and Exchange Commission*, 424 F. 2d 908 (C.A. D.C.).

No. 76-1547

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

SAMUEL H. SLOAN and SAMUEL H. SLOAN
d/b/a SAMUEL H. SLOAN & CO.,
Petitioners,

-against-

SECURITIES & EXCHANGE COMMISSION, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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NO. 76-1547

IN THE SUPREME COURT OF THE UNITED STATES
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

The petition for a writ of certiorari was filed on May 9, 1977. Respondent, the Securities & Exchange Commission ("S.E.C."), had 50 days to file a brief in opposition. See Supreme Court Rule 24(1). Therefore, the time to file a brief in opposition expired on June 28, 1977. No extension of time was requested or obtained by the S.E.C. and no brief in opposition was filed until July 20, 1977. Thus, the brief in opposition was filed without permission more than three weeks late. It is submitted that the brief in opposition is not in compliance with the rules of this Court with respect to timeliness and therefore should not be received and consequently the S.E.C. should be declared to be in default.

It is noteworthy that part of the basis for the administrative proceeding which is the subject of this petition for a writ of certiorari is the claim that Petitioner willfully violated S.E.C. reporting requirements by filing certain financial reports late. The administrative decision of the S.E.C. found that Petitioner had filed a Rule 17a-5 report of financial condition for the calendar year 1970 four months late and a Rule 17a-10 report of income and expenses for the same year eight months late (Pet. App. 32a, no. 16). The brief in opposition cites these delinquencies as a major part of the basis for the decision of the S.E.C. to bar Petitioner for life from being associated with any broker or dealer (See Brief in Opposition p. 4). Although the three weeks lateness by the S.E.C. in filing its brief to this Court is less than the four to eight months Petitioner was found to be late in filing his S.E.C. reports, the principle is the same. Surely the S.E.C. and the Solicitor General are under as much obligation to comply with the rules of this Court with regard to timeliness as Petitioner was under to comply with the rules of the S.E.C. Inasmuch as the S.E.C. has been unwilling or unable to comply with the rules of this Court with respect to the time for filing required briefs, it should not be permitted to impose the Draconian penalty of a lifetime bar upon Petitioner for a similar failure to comply with an S.E.C. rule. Accordingly, this petition for a writ of certiorari should be granted and the order of the S.E.C. invoking sanctions should be vacated.

In addition to being late, the brief in opposition is objectionable in that it adopts positions totally contrary to principles established by innumerable decisions of this and lower federal courts. For example, points 2 and 5 of the brief in opposition (Brief 6, 8) assert that the petition presents "purely factual issues" which "do not warrant further review." This is not true. These claims refer to questions presented to this Court concerning whether there is sufficient substantial evidence in the record to support the findings and the orders issued by the S.E.C. All federal appellate courts are in agreement that an issue

involving the substantiality of the evidence present a question of law, not of fact.

In point 5 of the brief in opposition (Brief p. 8), the S.E.C. asserts that "there is no occasion for further review of [the] factual determination," by the Court of Appeals that "there was sufficient evidence of probable manipulation of CJL's common stock and of the false and fraudulent representations as to its soundness and value to justify the Commission's conclusion . . . summarily to suspend trading." (Brief p. 8; Pet. App. 44a). Clearly, in the quoted passage the Court of Appeals did not make a factual determination but rather in its own words made a legal determination regarding the sufficiency of the evidence needed to support a trading suspension. Contrary to the position asserted by the S.E.C., there is no governing principle which prohibits review of that ruling by this Court. Indeed, review of the determination by the Court of Appeals on this point is astonishingly simple since the entire record of the particular trading suspension in question consists of two pieces of paper which are reproduced on pages 54a-55a of the petition. It is a simple matter to read these two pieces of paper and observe that nowhere on either of them is there a statement that there have been "false and fraudulent representations as to [Canadian Javelin Ltd's] soundness and value." Accordingly, the decision of the Court of Appeals is clearly erroneous. Indeed, although one of the documents in question once uses the term "manipulative activities" and twice uses the term "manipulation" (Pet. App. 55a), it does not provide any hints or clues as to the nature of the manipulation. In other words, the situation here is similar to that presented in *Buchman v. S.E.C.*, 553 F. 2d 816, 821 (2d Cir. 1977) where the S.E.C. warned brokers that there might be a manipulative scheme afoot but, after seven months of investigation, did not disclose the nature of the manipulation or who the culprits were. In short, the decision of the Court of Appeals is clearly in error with regard to the evidence supporting the reasons and justification for the trading suspension and contrary to the assertions by the S.E.C. there is nothing of a

factual nature that need be determined by this Court if it decides to grant the petition.

With further regard to this point, it is noteworthy that the cross petition for a writ of certiorari filed by the S.E.C. (No. 76-1607) which, according to the brief in opposition (Brief p. 5, n. 2) involves an "issue distinct from any of the issues Petitioners raise" relies on the same two documents that are included on pages 54a-55a of the appendix to the instant petition. However, in an apparent attempt to obfuscate the issues being presented to this Court, that petition refers this Court to two pages of the appendix in the Court of Appeals (See Petition in 76-1607, p. 3 and n. 2) and that appendix is not presently available to this Court and therefore cannot easily be read by the judges of this Court. The fact is that the pages cited in the cross petition as "C.A. App. A-11, A-12" are the same as pages 54a-55a in the appendix to the instant petition but presumably the S.E.C. prefers not to clarify this matter in order to avoid the embarrassment of having it become painfully obvious that there was no legal, factual or evidentiary justification for even the initial suspension of trading in Canadian Javelin Ltd.[1]

There can be no doubt that the S.E.C. is aware of pronouncements by justices of this Court that it does not sit to vindicate the rights of individual litigants or to resolve disputed issues of fact but rather it sits to resolve important legal questions. It is apparent that for this reason the S.E.C. has asserted falsely that "purely factual issues" are presented by this petition. Such tactics are highly censurable. In addition, it is noteworthy that the statement in the brief in opposition that there is no need for "further review" of the "factual issues" raised (Brief p. 6, point 2) is misleading because it appears that

1. It is noteworthy that the cross petition asks this Court to grant "summary reversal" of the decision of the Court of Appeals (See Pet. 12, n. 8). Presumably, the S.E.C. is hoping that this Court will grant that request without examining the record and consequently will never become aware of the flimsy basis for the year-long trading suspension of securities of Canadian Javelin Limited.

the Court of Appeals did not review the evidence. If the Court of Appeals did review the evidence, it made no mention of the fact (See Pet. App. 41a).

Several of the other arguments presented in the S.E.C.'s brief in opposition require comment. In addition, since the time of the filing of the petition for a writ of certiorari three courts of appeals have rejected the contentions of the S.E.C. based upon circumstances indistinguishable from those presented in the instant case. Those decisions come from the Third, Eighth, and District of Columbia Circuits and they create a conflict of decision between those circuits and the Second Circuit, although they pertain to matters not explicitly discussed in the decision of the Court of Appeals. A discussion of the above matters follows.

I

In three recent decisions of the Court of Appeals the contentions advanced by the S.E.C. in those cases which were also advanced by the S.E.C. in the instant case were rejected. The first of these was *Todd & Co., Inc. v. S.E.C.*, 557 F. 2d 1008 (3rd Cir. 1977). In that case, the Court of Appeals vacated an order of the S.E.C. on the grounds that Todd & Co., Inc. had not received notice of the charges. The situation there was closely analogous to the situation presented here where, as the petition points out, approximately half of the reasons given in the decision of the S.E.C. for revoking Petitioner's broker-dealer registration and barring Petitioner for life from being associated with any broker or dealer concerned events which took place after the administrative hearing was concluded. In fact, the lack of notice here was considerably more egregious than that involved in *Todd & Co.* In that decision, the Court of Appeals stated:

> 'The statute and rules are clear: a party being sanctioned or disciplined must have notice of the charges . . .

> The S.E.C. admits that "the Board reversed the District Committee's dismissal of the first charge without notice to respondents," but argues that "the Association's error, if any, was patently harmless," since both charges "turn on the same facts." We disagree. . . . The S.E.C. . . . should not cavalierly dismiss procedural errors affecting the rights of those subjected to sanctions but should insist upon meticulous compliance by the private organization." 557 F. 2d at 1014.

The next setback the S.E.C. received came in a decision from the Eighth Circuit in *Wasson v. S.E.C.*, No. 76-1665, decided June 21, 1977, CCH Fed. Sec. Law Rep. ¶96,092 [Current Binder]. In that case, the order of the S.E.C. was affirmed but only after the Court of Appeals held that a negligence-related standard was insufficient for determining "willfulness." The Court of Appeals held that the concept of willfulness in an administrative proceeding before the S.E.C. "implies something more than mere negligence," citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 209 n. 28 (1976). In the instant case, the S.E.C. applied a much lower standard of willfulness and stated that "An act is 'willful' within the meaning of that word as used in Section 15(b) of the Exchange Act even if the actor does not intent to violate the law" (Pet. App. 31a, n. 14). It was necessary for the S.E.C. to apply a standard similar to that applied in negligence cases in order to invoke sanctions against Petitioner since the findings of the S.E.C. concern such matters as tardiness in filing financial reports on behalf of Petitioner by Petitioner's accountant, which at most demonstrate negligent conduct on the part of Petitioner. There was no finding that the filings were so late as to diminish their value in serving the purposes intended by the requirements for filing the reports. The decision of the S.E.C. relies upon two decisions from the Second Circuit as authority for applying a low standard for determining "willfulness": *Tadger v. S.E.C.*, 344 F. 2d 5, 8 (2d Cir. 1965); and *Gearhart & Otis Inc. v. S.E.C.* 348 F. 2d 798.

802-803 (D.C. Cir. 1965). The S.E.C. continued to rely on these decisions in its brief to the Court of Appeals. Accordingly, there is a conflict of decision between the Second Circuit and the Eighth Circuit which it would be appropriate for this Court to resolve. This is particularly true since even since *Wasson* the S.E.C. has continued to maintain that the holding in *Ernst & Ernst v. Hochfelder* is inapplicable to administrative proceedings instituted by the S.E.C. *In the Matter of Steadman Security Corporation*, Securities Exchange Act Release No. 13695, 12 SEC Docket 1042, 1050 (June 29, 1977).

In *Wasson v. S.E.C., supra*, the order of the S.E.C. was affirmed because the Court of Appeals, after applying the higher standard for determining willfulness, determined that Wasson's conduct had been willful. The Court of Appeals held that the S.E.C. had correctly found that Wasson had illegally engaged in the fraudulent distribution of unregistered securities. The sanction invoked in that case, a 45-day suspension of a registered securities salesman, was relatively mild.

In the third case, *Collins Securities Corp. v. S.E.C.*, No. 75-2200, CCH Fed. Sec. Law Rep. ¶96, 122 [Current Binder] decided by the District of Columbia Circuit on August 12, 1977, the Court of Appeals held that "clear and convincing evidence," not "preponderance of the evidence," is the standard of proof in an administrative proceeding before the S.E.C. in cases where an expulsion or substantial suspension order is issued as a sanction. The "preponderance of the evidence" standard was applied in the instant case (see Pet. App. 10a) and according to the decision in *Collins Securities Corp., supra*, n. 15 it has been consistently applied as "the Commission's own interpretation of its case law of the proper standard." In *Collins* the Court of Appeals found it inappropriate to engage in a detailed discussion of the evidence and instead remanded the case to the S.E.C. with instructions to consider the evidence under the "clear and convincing evidence" standard. That decision, if followed here, would require the same result. Again, even recently the S.E.C. has stated that the "preponderance of the evidence," not "clear and convincing

evidence" is the correct standard. *In the Matter of Steadman Security Corp., supra,* 12 SEC Docket at 1060 n. 88. These decisions involving the appropriate evidentiary standard to be applied further demonstrate the falsity of the claim in the brief in opposition that the points raised in the petition concerning the sufficiency of the evidence raise "purely factual issues."

II

In an egregious error, the Court of Appeals held that an injunction is "in itself a sufficient ground to support the revocation" of a broker-dealer registration (Pet. App. 41a). Having gotten a better decision than it asked for, the S.E.C. now urges that this holding by the Court of Appeals is correct (Brief in Opposition, p. 6, point 2). However, the administrative deference rule applies here and the S.E.C. has consistently held that there must be a finding of "public interest" based upon the record of an administrative hearing independent of a finding that an injunction has been entered, in order for sanctions to be invoked under § 15(b)(5) and § 15(b)(7) of the Securities Exchange Act. For example, *In Re Amswiss International Corp. and Glenn Woo,* CCH Fed. Sec. Law Rep. ¶80, 721 [1976 Transfer Binder] (decided September 8, 1976) was a case in which the Order for Public Proceedings alleged that respondents, a registered broker-dealer and its principal officer, had willfully violated the registration requirements and antifraud provisions of the securities laws and that they had been enjoined for these violations. In that case, the respondents filed an amended answer which admitted that they had willfully committed the alleged violations and which admitted that they had been enjoined as a result. Each of the injunctions was entered after the conclusion of a trial in a contested case and in each instance the district judge found that the respondents had engaged in serious criminal wrongdoing involving the distribution of unregistered securities and market manipulation. See *S.E.C. v. Cooper,* 402 F. Supp. 516, 521 (S.D.N.Y. 1975); *S.E.C. v. D'Onofrio,* CCH Fed.

Sec. Law Rep. ¶95, 201 [1975-1976 Transfer Binder]. The losses to the investing public were in excess of $1,000,000. The broker-dealer in question was the conduit through which one Ramon D'Onofrio executed a series of manipulative schemes. D'Onofrio has been characterized by the Court of Appeals as "ubiquitously criminal". *United States v. Frank,* 520 F. 2d 1287, 1289 (2d Cir. 1975).

In spite of all this, the existence of the injunctions were deemed to be insufficient and a lengthy hearing was conducted to determine if the imposition of sanctions would be in the "public interest". The decision subsequently rendered states (*In Re Amswiss International, supra,* p. 86, 869):

> "With all of the allegations of the Order having been admitted, and the violations having been found accordingly, the sole remaining issue litigated is the determination, in the "public interest," whether any sanctions should be imposed against respondents, and if so, the extent thereof.
>
> The general position of the Division is that respondents, having admitted to engaging in aiding and abetting a stock manipulation during the relevant period, and having been enjoined not only with respect thereto but also in another comparable securities situation, should be subjected to the severest sanction, namely, a complete bar from the securities business. Respondents, on the other hand, urge that because of circumstances occurring since the relevant period, the public interest would be served by the imposition of such lesser sanctions as would permit both Amswiss and Woo to continue in the securities business."

The decision cites a series of transactions in which Woo agreed to "front" for D'Onofrio, one of which resulted in D'Onofrio being indicted for and pleading guilty to a bankruptcy fraud. In addition to that, the decision found Woo had executed a series of market manipulations in D'Onofrio's behalf. As a result of this, it was decided that Woo would be

barred from association with any broker or dealer for eighteen months following which he could apply for leave to become associated with a broker or dealer in the performance of back office operations only. Amswiss International Corp. was suspended for a period of sixty days but the S.E.C. subsequently reduced the suspension to thirty days. See *In Re Amswiss International Corp.*, Securities Exchange Act Release No. 13011, 11 SEC Docket 10541 (November 26, 1976).

In light of the above, the assertion by the S.E.C. in the brief in opposition that the issuance of an injunction is "in itself" a sufficient ground to support a lifetime bar and that there need be no independent finding supported by substantial evidence that the sanctions invoked are in the "public interest" is ridiculous. This is particularly true since one of the injunctions relied upon here had been vacated prior to the time this case was heard by the Court of Appeals. See petition No. 76-982 (*cert. denied*, April 18, 1977). The above cited case also demonstrates the extreme severity of the sanctions invoked by the S.E.C. here.

III

In a matter involving statutory construction, p. 7 point 4 of the brief in opposition states that under Petitioner's interpretation of 15(b)(7)[2] of the Securities Exchange Act, which authorizes the S.E.C. to "bar or suspend for a period not exceeding twelve months any person from being associated with a broker or dealer," the word "suspend" would be "surplusage." The problem with this argument is under the S.E.C.'s own interpretation of the same statute the words "for a period not exceeding twelve months" are surplusage. This result occurs because the S.E.C. often imposes a "bar" for a period of finite duration exceeding twelve months. The petition cites one example of this in a case where the S.E.C. invoked a two-year bar (Pet. 33). There are many others. For example, in *Collins Securities Corp. v. S.E.C. supra*, the S.E.C. ordered that "petitioner Collins be barred from association with any broker or dealer, provided that 'after two years, he may apply to the Commission to become so associated . . . '."

2. In this brief, the practice will be followed of citing to the statute as it existed at the time of the April 28, 1975 order of the S.E.C. invoking sanctions.

What the actions of the S.E.C. boil down to is that under the S.E.C.'s interpretation of §15(b)(7) the words "suspend" and "bar" have become terms of art so that when the S.E.C. wishes to exclude an individual from the securities business for a period of twelve months or less it uses the term "suspend" whereas when it wants to exclude an individual from the securities business for a longer period of time it uses the term "bar."

The S.E.C.'s interpretation of the statute is clearly improper. When Congress included the words "for a period not exceeding twelve months" in the statute, it clearly imposed a limit on the S.E.C.'s power, a limit which the S.E.C. has chosen to ignore. The situation here is similar to that presented with regard to trading suspensions where the applicable statute authorizes the S.E.C. to suspend trading in a security "for a period not exceeding ten days" and nevertheless the S.E.C. has interpreted the statute in such a way to give it the authority to invoke a trading suspension for an indefinite time period. Indeed, the S.E.C. has explained that the term "permanent bar" actually means a bar for an indefinite time period and "so-called lifetime bars are actually bars of indefinite duration." *In the Matter of Steadman Security Corp., supra*, 12 SEC Docket at 1064 n. 100.

Petitioner has been unable to locate any legislative history such as Congressional debates which shed light on the interpretation Congress intended for §15(b)(7), a provision which became law as a result of the 1964 amendments to the Securities Exchange Act. However, legislative history exists which makes it clear that this section is not being used here for the reason which Congress gave for its enactment. Both the House and the Senate Report state that §15(b)(7) is intended to overrule *Wallach v. S.E.C.*, 202 F. 2d 462 (D.C.Cir. 1953) which held that the S.E.C. may not join individuals other than registered broker dealers in

broker dealer revocation proceedings. See S. Rep. No. 379, 88th Cong., 1st Sess. 79 (1963); Hearings on Investor Protection before the Subcommittee of the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess. 228 (1963). In the instant case, the broker dealer in question is a sole proprietorship so a proceeding against the broker dealer is automatically a proceeding against the individual even without the benefit of §15(b)(7). However, through its expansive interpretation of §15(b)(7), the S.E.C. has in this case invoked the penalty of a lifetime bar which is a penalty far more severe than that permitted prior to the 1964 amendments to the statute.

As the petition notes (Pet. 33-34), the question presented with regard to this matter is one purely of statutory construction which can and ought to be decided by this Court. As is explained in more detail in the brief in opposition in No. 76-1607, which involves a similar statutory question dealing with trading suspensions, the "administrative deference rule" does not apply when the question presented is whether the administrative agency has exceeded the limits on its authority placed by Congress.

IV

The brief in opposition asserts on p. 7 point 3 thereof that the Court of Appeals was correct in ruling that the principles set forth in *Jones v. S.E.C.*, 298 U.S. 1 (1936) have no application to the instant case. However, the authorities which the S.E.C. cites in support of that conclusion reached precisely the opposite result. In *Peoples Securities Company v. S.E.C.*, 289 F. 2d 268, 269 (5th Cir. 1961) the Court stated that the question of whether a broker dealer has the right to withdraw its application for registration "turns on statutory construction and the applicability of *Jones v. S.E.C.*, 298 U.S. 1 (1936)." The Court then spent seven pages of detailed analysis of the facts and holdings of *Jones* and the decisional authority which developed as a result. At no time did the Court state or imply that *Jones* was inapplicable for the reason that it involved a securities registration rather than a broker dealer registration.

It is true that in *People Securities Company, supra* and in its companion case *Blaise D'Antoni Associates Inc. v. S.E.C.*, 289 F. 2d 276 (5th Cir. 1961) *rehearing denied* 290 F. 2d 688 (5th Cir. 1961), which the S.E.C. also cites, the Court reached the opposite result from that which Petitioner is urging here. The Court there held that *Jones* only applied in cases where the registration statement had not yet become effective. *Peoples Securities Company, supra*, 289 F. 2d at 272. In addition, the Court stated that at the time of the Jones decision it was illegal to offer a security for sale until its registration statement had become effective but in 1954 Congress had amended the Securities Act to permit applicants to make offers to sell during the period after filing but before the registration became effective, *Id.* at 273, and the Court reasoned that this change in the law meant that now there was a public interest in the contents of a securities registration statement immediately upon filing with the S.E.C. On this basis, the Court held that this public interest precludes an absolute right to withdraw a registration statement as opposed to the situation which existed at the time of *Jones* where the public interest was non-existant until the registration statement had become effective. The Court then said that the S.E.C. had concluded that *Jones* need not be followed. *Id.* At 273-274. From that point, the Court made an unexplained jump to the conclusion that there was similarly no absolute right to withdraw a broker dealer registration statement either before the statement had become effective, as was the case in *Peoples Securities Co., supra*, or after it had become effective, as was the case in *Blaise D'Antoni & Associates Inc., supra.*

Petitioner contends that this ruling was erroneous and seeks review of the issues involved in this Court. The reasoning of the decision of that Court of Appeals was predicated upon the presumption that the controlling consideration in *Jones v. S.E.C.* was the non-existance of any public interest in the registration statement which was the subject of that case. *Peoples Securities*

Co., supra, at 272. However, nowhere in the opinion of the Court in *Jones v. S.E.C.* are the words "public interest" to be found, which is not surprising in view of the vague and general character of the term "public interest." It might be argued that the public or society as a whole has an interest in the detection and prosecution of the violators of any criminal statute regardless of whether an individual member of the public was or could have been adversely affected by the criminal violation. Under this or even more stringent definitions, there existed a "public interest" in the circumstances involved in *Jones* in spite of the fact that "so far as the record shows there were no investors, existing or potential, to be affected." 298 U.S. at 23.[3] Thus, the non-existence of any public interest could not have been the controlling consideration in *Jones.* Rather, the basis for the decision of this Court was that "a withdrawal accomplishes everything which a stop order would accomplish, as counsel for the commission expressly conceeded at the bar." 298 U.S. at 23. In *Jones,* the S.E.C. was attempting to achieve objectives which this Court deemed to be improper. Under the pretext of a stop order proceeding, the S.E.C. had issued a subpoena duces tecum requiring Mr. Jones personally to produce virtually all of his financial records for inspection by the S.E.C. staff. It was obvious that the S.E.C. was attempting to use the stop order proceeding as the basis for launching a general investigation into the affairs of Mr. Jones in order to lay the groundwork for a possible criminal prosecution. Consequently, this Court ruled that the S.E.C. was engaging in nothing more than "a fishing expedition. . . an undertaking which uniformly has met with

3. Incidentally, so far as the record in the instant case shows there were no investors, existing or potential, to be affected since Petitioner, as a matter of policy, did not do business with public investors. The S.E.C. staff was aware of this. For example, page 2 of a memorandum dated March 20, 1972, in which the S.E.C. staff requested the S.E.C. to institute the instant administrative proceeding, states that "the audit indicated that Sloan had no public customers and accordingly, a SIPC receiver has not been requested." This memorandum was recently released to Petitioner pursuant to the Freedom of Information Act.

judicial condemnation," 298 U.S. at 26, and which if allowed, would permit the S.E.C. to engage in "unlawful inquisitorial investigations" which were "among those intolerable abuses of the Star Chamber, which brought that institution to an end at the hands of the Long Parliament in 1640."

This point is further clarified in the dissenting opinion of Mr. Justice Cardozo. Again there is no discussion of the existence or non-existence of any "public interest" beyond doubts expressed as to "whether the public interest will be prompted by forgetting and forgiving." 298 U.S. at 30. Instead, the dissenting opinion said that the stop order proceeding should be permitted to go forward because it would provide an efficient means for developing the proof needed for a successful criminal prosecution. In this regard, Mr. Justice Cardozo stated:

> "[T]he act is explicit (section 22(c), 15 U.S.C. §77v(c)) that a witness is not excused from testifying on the ground that the testimony required of him may tend to incriminate him or expose him to a penalty or forfeiture. . . . Inquiry by the commission is thus more penetrating and efficient than one by a grand jury where there is no statutory grant of amnesty to compel confederates to speak. . . . It is no answer to say that on the record now presented a crime has not been proved or even definitely charged. An investigator is not expected to prove or charge at the beginning the offenses which he has reason to suspect will be uncovered at the end." 298 U.S. 31.

Thus, the dissenting minority believed that a criminal grand jury type investigation forms a valid and proper rationale for an administrative proceeding before the S.E.C. and a majority of this Court held otherwise. Whether that decision still stands as the law of this land presents an important question which ought to be reviewed by this Court. It is submitted that contrary to the assertions by the S.E.C. in its brief in opposition, the case presented here squarely presents the issue of whether *Jones v.*

S.E.C., supra, is still authoritative or whether it is to be merely regarded as "one of the major defeats of New Deal legislation . . . not nearly so significant for its holding as it is to historians of the Supreme Court." *Peoples Securities Company, supra,* 289 F. 2d at 271 citing in Part I Loss, *Securities Regulation* 200 (1951 Ed.). In other words, the question is whether *Jones* is one of the decisions from a bygone era which "should not now be taken seriously," cf. *National Cable Television v. United States,* 415 U.S. 336, 353 n. 1 (1974) (Marshall, J., concurring) citing 1 K. Davis, *Administrative Law Treatise* 2.01 (1958), or whether it stands as an authoritative ruling alongside other decisions of this Court.

Actually, in the instant case the constitutional problem in an administrative agency's refusal of permission to withdraw a registration statement is more squarely presented than it was in *Jones* because there the S.E.C. acted expeditiously whereas here the S.E.C. delayed for a lengthy time period and Petitioner was severely prejudiced as a result. In the instant case, Petitioner filed a broker dealer withdrawal request which was received by the S.E.C. on September 17, 1973 (Record pp. 1240, 1242). Under S.E.C. Rule 15b 6-1, 17 C.F.R. §240, 15b 6-1, the withdrawal request would have become effective on the 60th day thereafter, which was November 16, 1973, were it not for the fact that the same rule provides:

> "If a notice to withdraw from registration is filed with the Commission at any time subsequent to the date of the issuance of a commission order instituting proceedings pursuant to Section 15(c) to censure, suspend, or revoke the registration of a broker or dealer . . . the notice of withdrawal shall not become effective except at such time and upon such terms and conditions as the Commission deems necessary or appropriate in the public interest or for the protection of investors."

The effect of this rule, as applied by the S.E.C., is that the

S.E.C. will take no action on a broker dealer withdrawal request while an administrative proceeding is pending. A recent decision, *A.J. White & Co. v. S.E.C.*, 556 F. 2d 619, 624-625 (1st Cir. 1977), upheld the authority of the S.E.C. to do this. However, that decision did not discuss either Rule 15b 6-1 or the constitutional questions raised here but merely based its holding on the broad discretionary authority given to the S.E.C. in §15(b)(6) of the Securities Exchange Act to permit withdrawal under terms "appropriate in the public interest or for the protection of investors."

The constitutional problems involved in the refusal to permit a broker dealer to withdraw are evident in the instant case because this refusal continued for a period of more than seventeen months from November 16, 1973 until April 28, 1975, when Petitioner's broker dealer registration was revoked, particularly since it was during this seventeen-month period when many of the events occurred which the S.E.C. cited as the basis for its decision. In other words, the S.E.C. decided that it was "appropriate in the public interest" to require Petitioner to continue as a registered broker dealer from November 16, 1973 until April 28, 1975 and at that point found it was appropriate in the public interest to revoke Petitioner's broker dealer registration and to bar Petitioner from being associated with any broker or dealer. The illogic of this result is obvious and demonstrates the arbitrary and capricious nature of the actions of the S.E.C. The federal courts long have been aware of the problem of excessive delays by administrative agencies including the S.E.C., See *Gearhart & Otis Inc. v. S.E.C., supra* at 800, and authorities there cited. A prolonged refusal to permit the withdrawal of a broker dealer registration is especially prejudicial. Assuming that certain legal positions taken by the S.E.C. staff are correct, a broker dealer caught in the situation of Petitioner must maintain and keep current all of the required financial records, must file an annual certified financial statement as well as other required reports with the S.E.C., must pay required fees and assessments, and must maintain the required net capital for

an indefinite period of time while waiting for the S.E.C. to make up its mind. Moreover, since the S.E.C. insists that the required financial records be maintained in an "easily accessible place," a broker dealer in the position of Petitioner may be required to maintain an office and a staff. In short, a broker dealer in the position which Petitioner found himself is required to bear considerable burden and expense all because of the length of time it takes the S.E.C. to resolve its administrative proceeding. This situation creates abuses that the Sixth Amendment was intended to prevent. The effect of the burden of remaining as an involuntary broker dealer in the case of an individual sole proprietor such as Petitioner in this case was to make it prohibitively difficult to seek and obtain gainful employment outside of the securities area due to the necessity of devoting Petitioner's full attention to satisfying the myriad of S.E.C. requirements as well as fighting the S.E.C. in court. Moreover, a broker dealer which has filed a request to withdraw its registration has presumably ceased securities activity, as was the case with Petitioner here, and presumably would not be able to derive income from that source. In short, the actions or lack of action of the S.E.C. had the effect of making it virtually impossible for Petitioner to earn a living and to lead a normal sort of life or to gain an income from any source. This placed Petitioner in a terribly unfair position. The significance of this is demonstrated by the fact that the decision of the S.E.C. devoted as much attention to events which occurred after Petitioner had filed his broker dealer withdrawal request as it did to facts found from the testimony at the administrative hearing. As the petition points out, the administrative hearing was concluded on November 1, 1972 (Pet. 28) and no further testimony or evidence was received in the record after that date. After the Initial Decision by the Administrative Law Judge (Pet. App. 9a-22a) and the granting of a petition for review by the S.E.C., the final brief on behalf of Petitioner was filed on July 20, 1973 and the final brief on behalf of the S.E.C. was filed on August 14, 1973. As noted previously, on September 17, 1973 Petitioner filed a

broker dealer withdrawal request. This came as a result of a business decision to terminate Petitioner's activities as a broker dealer, due to a severe decline in the volume in the market in securities traded in the pink sheets. (It was not, as the Court of Appeals implies (Pet. App. 39a) as the result of an attempt to thwart the process of the S.E.C.'s administrative proceeding which had been commenced more than 16 months earlier). Thus, as the petition notes (Pet. 34-35) and the brief in opposition impliedly admits (Brief p. 6), the two court injunctions, dated January 18, 1974 and January 17, 1975, which now form the principal basis for the penalties invoked against Petitioner, (see Brief pp. 4-6) were both issued after Petitioner had gone out of business, after Petitioner had filed a broker dealer withdrawal request and long after the administrative hearing had been concluded and the record closed. The prejudicial nature of this is further demonstrated by the fact that it is apparent from the S.E.C.'s decision that had the S.E.C. decided this case in September, 1973 or thereabouts it would have invoked far less severe sanctions if any at all. For example, the section of its decision entitled "public interest" (Pet. App. 27a-29a) discussed solely events which occurred after September, 1973.

V

It should be noted that the brief in opposition filed by the S.E.C. continues the practice which has characterized briefs filed by the S.E.C. in the various district court proceedings, in the Court of Appeals, with the Administrative Law Judge and with the S.E.C. itself of making statements which, although sometimes not totally false, are calculated to create confusion and cause misunderstanding concerning the facts of the cases and the contentions of the parties. For example, the first paragraph of point 1 on page 5 of the brief in opposition appears to be calculated to create the misleading impression that Petitioner did receive notice that the permanent injunction and the second preliminary injunction might form the basis for the

Commission's imposition of sanctions. Of course, the only injunction alleged in the notice (Pet. App. 3a) and the only injunction which had been entered at the time of the administrative hearing was a preliminary injujction which was entered on June 24, 1971 by consent and without the defendant admitting or denying the charges. The Court of Appeals apparently misapprehended this point because in its decision it seems to state that it had dismissed an appeal from the preliminary injunction (see Pet. App. 41a) whereas, in fact, no appeal from that injunction had been taken.

Once any possible confusion on this matter is cleared up it is apparent that in its brief in opposition the S.E.C. is advancing a contention which it did not dare to advance to the Court of Appeals, namely: that the S.E.C. has the discretionary authority to revoke the broker dealer registration of any securities broker which has ever been enjoined, wither permanently or temporarily, by any federal court, even by consent. Since nowadays virtually every major securities broker dealer has at one time or another entered into the standard consent injunction, this contention, if correct, would give the S.E.C. the life or death discretionary authority over the existence of virtually every major broker dealer in the securities industry. Even if this result were authorized by statue, which it is not, see §15(b)(5) of the Securities Exchange Act, it would not be permitted by the Constitution. See e.g. *Brown v. Allen*, 344 U.S. 443, 496 (1952) where Mr. Justice Frankfurter observed "[d]iscretion without a criterion for its exercise is authorization of arbitratiness."

When read carefully, it can be seen that the brief in opposition admits that Petitioner did not receive notice that two court injunctions and an affidavit filed in the Court of Appeals would be relied upon by the S.E.C. in making its decision. Neither were these documents made part of the record or offered into evidence. It argues, however, that these matters involved "indisputable facts" (Brief in Opposition p. 6) and that "Petitioner's do not show how more explicit notice would have enabled them to refute these facts." *Id.* Presumably, the S.E.C.

likens this case to that presented in *Dixon v. Love*, No. 75-1513,—U.S.—(May 16, 1977), where this Court ruled that the Constitution did not require an administrative hearing prior to the revocation of a driver's license because matters of public record in that case required a mandatory revocation. One problem with this approach is that, forgetting the constitutional considerations, the applicable provisions of the Securities Exchange Act and the rules promulgated thereunder require prior notice and the opportunity for an administrative hearing whereas neither were required by law in the *Dixon* case. See §15(b)(5) and §15(c)(7) of the Securities Exchange Act. Moreover, the Administrative Procedure Act, 5 U.S.C. §556(d) as well as Rule 17(g)(2) of the Rules of Practice of the S.E.C., 17 C.F.R. §201.17(g)(2) require the S.E.C. to base all of its fact findings "on the record" and this clearly precludes fact findings based on events which took place after the record was closed.

In addition, the claim in the brief in opposition that the S.E.C. based its decision on "indisputable facts" is false. Rather, the S.E.C. made a purely subjective determination based on conclusions it reached without giving Petitioner notice or the opportunity to be heard. For example, it stated that Petitioner's conduct in 1974 and 1975 shows "his continuing disposition to disregard or defy the rules governing registered broker dealers." (See Brief in Opposition p. 4; Pet. App. 28a). Indeed, it is this sentence which seems to form the basis for the S.E.C.'s imposition of Draconian penalties in view of the unexceptional nature of the violations which were found based on the record of the administrative hearing. The S.E.C.'s conclusion is based not on any facts alleged in the order for public proceedings but rather on the two court injunctions and other matters which came up long after the administrative hearing was concluded. To impose penalties based on sweeping conclusions without giving Petitioner notice and the opportunity to be heard is clearly violative of both the Administrative Procedure Act, the Securities Exchange Act and the Rules of Practive of the S.E.C.; hence the order of the S.E.C. must be vacated. In addition, it is

apparent that the S.E.C. invoked the severe sanctions it did primarily because of statements made by Petitioner critical of the S.E.C. itself (See Pet. App. 28a, 35a n. 28). This result is barred by *Taylor v. Hayes*, 418 U.S. 488, 501-503 (1974).

It should also be said that the S.E.C. did not invoke sanctions merely upon the "indisputable facts" of the existence of the January 18, 1974 and January 17, 1975 injunctions but rather based its decision on its subjective evaluation of the significance of the findings of fact and other determinations made by Judge Ward. Indeed, it seems that the fact findings in the S.E.C.'s decision concerning the time period covered by the administrative hearing (Pet. App. 24a-26a) were copied largely from the decision rendered by Judge Ward since many of them have no support in the record of the administrative hearing. For example, decision of the S.E.C. finds that an S.E.C. staff investigator visited Petitioner's office on February 25, 1971 (Pet. App. 25a), whereas the Administrative Law Judge, who did not have the benefit of Judge Ward's decision and had only the record of the administrative proceeding before him, did not find that a visit had taken place at any time in February, 1971. (Pet. App. 11a). Thus, the S.E.C.'s finding may have been based on Judge Ward's decision rather than the record of the administrative hearing. See *S.E.C. v. Sloan*, 369 F. Supp. 996, 998 ¶9 (S.D.N.Y. 1974). Moreover, the decision of the S.E.C. discusses at length fact findings made by Judge Ward concerning events which occurred in 1973. (See Pet. App. 27a, 32a n. 19). This was clearly improper because the S.E.C. accepted these findings as proven evidentiary fact whereas they clearly were not supported by the record before the S.E.C. which did not cover events occurring in 1973. The purpose of judicial findings of fact is to aid appellate review, *Lemelson v. Kellogg Co.*, 440 F. 2d 986 (2d Cir. 1971) and to avoid prejudice to the parties. *Leighton v. One William Street Fund, Inc.*, 343 F. 2d 565, 567 (2d Cir. 1965). Clearly, it was improper for the S.E.C. to use a district court's findings of fact for a purpose for which they were never intended, namely as a collateral basis for the issuance of an order of an

administrative agency which did not have before it the transcript or the evidence upon which these findings were based.[4] Had Petitioner received notice that the S.E.C. was going to consider and evaluate Judge Ward's fact findings he would have had the opportunity to offer mitigating circumstances and to show that the conduct set forth in Judge Ward's fact findings was not willful and he would have had the opportunity to show that the fact findings Judge Ward made were not supported by the evidence as was the case with the particular fact findings cited in the S.E.C.'s decision. The S.E.C., in its brief to the Court of Appeals in Petitioner's appeal from Judge Ward's order of injunction, abandoned those fact findings, namely Judge Ward's findings No. 20 and 31.[5]

The cavalier attitude of the S.E.C. towards the notice and hearing requirement was recently taken to task by the Third Circuit Court of Appeals in a case involving parallel notice requirements in proceedings before the NASD. See *Todd & Co., Inc. v. S.E.C., supra.* The Court there ruled that one cause of action should have been dismissed by the S.E.C. because of the lack of notice. The Court therefore vacated the order of the S.E.C. and the matter was remanded to the S.E.C. for reconsideration of the sanctions. This last point is significant since it demonstrates that if even part of the findings of the S.E.C. are set aside, the proper course is a remand. The same conclusion was reached in *NLRB v. Pipefitters*, 429 U.S. 507, 522 n. 9 (1977).

4. Petitioner was denied the right to have those findings reviewed by a proper reviewing court when the Court of Appeals *sua sponte* and without notice dismissed Petitioner's appeal of Judge Ward's injunctive order. *S.E.C. v. Sloan*, 538 F. 2d 13 (2d Cir. 1976) *cert. denied*, 429 U.S. 1023 (1976).

5. The brief the S.E.C. filed in that appeal argued that certain of Judge Ward's other findings of fact were supported by evidence and therefore it was unnecessary for the court to reach the question of the validity of all Judge Ward's findings.

VI

This demonstrates another error in the decision of the Court of Appeals since it affirmed the order of the S.E.C. without passing on the question of whether the S.E.C.'s findings of fact were supported by substantial evidence. It is clear that the Court of Appeals should have examined the evidence and had it found it to be insufficient it should have ordered a remand. Based on this analysis, this Court should at a minimum order this case remanded to the Court of Appeals with instructions to that Court to review the evidence in the record.

It does not require much thought to reach the conclusion that at least some of the findings of the S.E.C. could not have been supported by substantial evidence. For example, as the petition points out (Pet. 41), the S.E.C. "found" that Petitioner violated S.E.C. Rule 17a-11 on September 15, 1971 by not sending the S.E.C. a telegram stating that he had violated the net capital rule on that date (See Pet. App. 32a, n. 17). However, as the brief in opposition admits (Brief, p. 3, n. 1) the S.E.C. found violations of the S.E.C.'s net capital rule only in the months of January, February, June and July, 1971 and January, 1972. Therefore, the S.E.C. did not find that Petitioner had violated the net capital rule in September, 1971. Consequently it is obvious that the S.E.C. could not reasonably have found that Petitioner was required to send the S.E.C. a telegram on Sept. 15, 1971 notifying the S.E.C. that on that date he had violated the net capital rule. Therefore, the finding by the S.E.C. that Petitioner violated Rule 17a-11 on Sept. 15, 1971 is totally without basis. Accordingly, under *NLRB v. Pipefitters, supra,* and other authorities previously cited, this in itself is sufficient to require a remand to the S.E.C. Although the example just given is rather elementary and obvious, a detailed examination of the record will show that most of the other findings of the S.E.C. are seriously flawed in equally obvious ways. In other words, the claims made by the S.E.C. are, as Judge MacMahon characterized the presentation made by the S.E.C. in another case,

"confused, disjointed, unfocused, incoherent, and, at times, incomprehensible." See *S.E.C. v. Commonwealth Securities Inc.*, CCH Fed. Sec. Law Rep. ¶95, 495 (S.D.N.Y. 1976). It is noteworthy that the brief in opposition filed by the S.E.C. never states that the S.E.C.'s findings are supported by substantial evidence. In this respect, it is similar to the brief the S.E.C. filed in the Court of Appeals in this case, which, while arguing that there were ample grounds to support the order of the S.E.C., never claimed that the specific facts found by the S.E.C. were supported by substantial evidence and never cited pages of the transcript which supported all of the specific fact findings made by the S.E.C.

At this point it is appropriate to say that even the single section of the findings of fact of the S.E.C. which are quoted in the brief in opposition have little basis. The passage in question can be found in the brief in opposition, p. 3, n. 1. This footnote states, in part, that Petitioner did not challenge the findings of violations of the S.E.C.'s net capital rule in his appeal to the Commission. This is not correct. The first point that should be noted in this regard is that in the appeal in question Petitioner was appealing from the specific fact findings by the Administrative Law Judge. These fact findings can be found at Pet. App. 9a-22a. In comparing these fact findings to the findings ultimately rendered by the S.E.C. one can observe numerous discrepancies. Many of the most serious findings of misconduct by the Administrative Law Judge were not adopted by the S.E.C. Instead, the S.E.C. made new findings on matters not discussed by the Administrative Law Judge. In his brief to the Commission in the petition for review of the decision of the Administrative Law Judge, Petitioner's counsel understandably devoted most of his attention to refuting some of the wild and baseless charges which the Administrative Law Judge made including those found at Pet. App. 15a. It is true that the 12 page brief which Petitioner's counsel filed with the S.E.C. did not attempt to refute on a sentence by sentence basis every statement in the Administrative Law Judge's initial decision. However, he was

not required to since Rule 17(b) of the Rules of Practice of the S.E.C., 17 CFR §201.17(b), provides that the reasons for objections to the initial decision "may be stated in summary form" and Petitioner's brief and petition for review made it clear that he was protesting all of the findings of the Administrative Law Judge. It is also significant that during the period when Petitioner's counsel was preparing his brief to the Commission, he was denied access to the administrative proceeding transcript and was not allowed to make copies of the record. See *S.E.C. v. Samuel H. Sloan & Co.*, 369 Supp. 994 (S.D.N.Y. 1974); see also Record p. 1184-1186. This severely inhibited his ability to prepare a brief directly refuting every sentence contained in the decision of the Administrative Law Judge.[6]

With regard to the claim that Petitioner did not challenge the accuracy of the net capital computations prepared by S.E.C. staff investigators Bruder and Kanoff (Brief in Opposition p. 3, n. 1), it can be readily seen that this claim is incorrect. Petitioner's counsel cross-examined Bruder and Kanoff at length with regard to the accuracy of their computations and a reading of this transcript demonstrates that these computations were filled with errors. Kanoff, in fact, directly admitted, when confronted with the evidence, that his computations contain erroneous evaluations of the market prices of various securities included in the capital of the Petitioner. Transcript 232, 233, 249. The S.E.C. staff has made no effort to correct these errors. As for Bruder, the following section of the cross-examination concerning his computation of Petitioner's capital as of January 29, 1971 demonstrates his lack of understanding of the basic double entry system of bookkeeping and his unfamiliarity with the method by which net capital is computed. (Bruder, it must be remembered, was not an accountant and prior to his em-

6. The S.E.C. staff defended its actions on the grounds that Petitioner could purchase a copy of the 443 page transcript from the court reporter at the rate of $1.35 per page (Record p. 1184-1186).

ployment with the S.E.C. had been a margin clerk for a stock brokerage firm.) (Transcript 69-71):

"Q. What you are stating is that Mr. Sloan had told you previously that he had received $10,000?

A. Certain monies.

Q. From his mother?

A. Right.[7]

Q. And you found this in the capital account of Mr. Sloan?

A. Not in Mrs. Sloan, no.

Q. Mr. Sloan?

A. I found it in the capital account here.

Q. That is what I asked. Did you find it in the capital account of Mr. Sloan?

A. Yes.

Q. You did?

A. It was included.

Q. Why is the reason you have deleted it from his capital as of January 29th?

A. We could not ascertain that it was actual capital.

Q. Is there any question that the $10,000 amount is reflected among the assets on January 29th?

A. It is not recorded in the assets. I have it included in the liabilities, sir.

Q. Well, then, if you have done that. may I ask you, please, if the amount is not included among the assets, why would you include it among the liabilities?

A. Well, it would be included in over-all assets, maybe as cash in the bank or funds on deposit with another broker or it may be part of his fail to delivers.

Q. I asked you the question before, sir, is it, the $10,000, is it included among the assets, and you said no.

I asked you the next question—

7. Bruder apparently had a misunderstanding in a conversation with Petitioner because Petitioner never received $10,000 or any similar sum of money from his mother and his books and records did not reflect the receipt of that or any other amount.

A. I stand corrected. It is in there.

Q. Were you in error on that testimony?

A. On that one particular question, yes.

Q. Then, would you tell us again why you listed it among the liabilities, please?

A. We could not confirm that it was part of Mr. Sloan's capital.

We wrote a letter to Mrs. Sloan requesting that she had given it to him as a gift or as a loan.

It was not stated and we never received a reply.

Q. Would it be correct to state that if the mother of Mr. Sloan would verify that that was a complete gift, that it should be included as capital and not liability on January 29th?

A. Yes.

Q. Would that be correct, Sir?

A. Yes.

Q. Would you then say that if that be so, then this computation is in error?

A. If it was an actual gift, yes, sir."

Thus, based upon the mistaken assumption that Petitioner had received an "unconfirmed gift" in the amount of $10,000 from his mother, Bruder deducted that amount in his computation of Petitioner's net capital. That deduction was compounded when Bruder took an additional deduction based upon the ratio the net capital rule requires broker-dealers to maintain between "aggregate indebtedness" and net capital. Bruder included the $10,000 in his computation of Petitioner's aggregate indebtedness thereby increasing the net capital which Petitioner was required to maintain in order to be in compliance with the net capital rule. After making these and other erroneous computations, Bruder arrived at the conclusion that Petitioner had a net capital deficiency amounting to $11,912 (Pet. App. 31a, n. 11). Petitioner's accountant, however, filed with the S.E.C. a certified financial statement for the same date showing that Petitioner had excess net capital amounting to $4,529.99. As the Petitioner notes, the S.E.C. has never challenged the accuracy of that computation [8] (Pet. 55).

With regard to Bruder's other computation of net capital, namely his computation as of January 18, 1971 which can be found at Pet. App. 56a, the following cross-examination took place (Transcript 58-63):

Q. . . . Do you know for a fact that they are monies owed to customers as at January 18th, Mr. Bruder?

A. On over-all monies owed to customers. That is, there were more credit balances than debit balances.

Q. And you botained that information from the subsidiary ledger called customer ledger of Sloan & Co., is that right?

A. From the ledgers here.

Q. From the ledgers maintained by Sloan & Co.?

A. No. Yes, that's right, the ledgers maintained by Sloan & Co. [9]

Q. Could you tell us the names of those customers?

A. I cannot from this sheet.

Q. Did you make a schedule of those or a listing of those customers?

A. No, I did not.

Q. Why—

A. Because—

Q. Pardon me, Sir?

A. At that time I don't believe there was a complete list of them.

Q. I just asked you then, did you examine and find in the

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8. Pursuant to the Freedom of Information Act, the S.E.C. in 1976 gave Petitioner access to yet another computation by a member of the S.E.C. staff which states that Petitioner had a net capital deficiency of $1657.09 on the same date.

9. In fact, the ledgers maintained by Sloan & Co., which are presently in the custody of the clerk of the United States District Court for the Southern District of New York as part of the record of *S.E.C. v. Sloan & Co.*, 71 Civil 2695, show that there were no customer accounts open on the books of Sloan & Co.

customer ledger, which you said was maintained, did you find a schedule—pardon me.

Did you find balances totalling 11,010.13 as monies due to customers?

A. No, I did not.

Q. You did not find it in the customers' ledger then?

A. No.

Q. Where did you find or where did you establish such amount?

A. From the general ledger.

Q. In what accounts did you look?

A. There was an account set up, receipts and payments, account of customers.

Q. Did you examine both sides of that account?

A. That's the way—I examined both sides to see, and the total was that amount.

Q. What was the total of the debits in that account, sir, if you know?

A. I don't know, sir.

Q. And you don't know the amount of credits, other than, as you state, the net amount is 11,010.13?

A. Yes.

Q. Mr. Bruder, did you examine any other record that was not a ledger, that established that amount for you?

A. No.

Q. You insist that it was the customer's ledger.

A. I looked through a customer's ledger.

This balance came from the record of the general ledger.

Q. Was there a control account in the general ledger that showed this balance, sir?

A. No. There was no record in the control account.

Q. Then, if I understand you, is it your testimony that the general ledger trial balance prepared from the general ledger, would not contain this amount? Is that correct?

A. That's right. This is a balance which I took from Sloan's records.

Q. Some records of Sloan's?

A. Some records of Sloan's.

Q. Which you now identify as the customers' ledger?

A. Yes.

Q. Would it also be correct to say that the unaccounted for difference is not a general ledger trial balance account, in the amount of 10,043.90, that no such account exists?

A. That is an account that I put on the sheet to balance off the assets and liabilities.

Q. So would it be possible that you overlooked an account in the ledger?

A. I don't believe it would be possible.

Q. Would it be possible?

MR. RASHES: Your Honor, I think the witness just answered that question.

If you want to read it back—

JUDGE TRACY: Read the question.

MR. TAYLOR: I will withdraw it.

JUDGE TRACY: All right.

Q. Is it correct then or would it be possible that the customer account figure that you have also is in error?

That there is no such account in the general ledger for that amount?

A. What are you—

MR. RASHES: I object.

I don't believe Mr. Bruder—I think Mr. Bruder testified he took this from the general ledger.

A specific item described as receipts—receipts from our customers. I think this has been testified to already.

MR. TAYLOR: He also—

JUDGE TRACY: I don't think he testified anything is in error.

That is your statement.

MR. TAYLOR: I believe he testified that the 11,010.13 was not a ledger account.

JUDGE TRACY: That doesn't mean it was in error, does it?

MR. TAYLOR: It doesn't say it was, either, your Honor.

JUDGE TRACY: As I understand it, he took the figure off the books and records of Mr. Sloan. He didn't go back to the subsidiary supporting documents to see if it was properly booked. He at least took it off the general ledger account, which had that much difference in it.

MR. TAYLOR: I would submit that is not his testimony.

Without prejudicing my examination, I will tell you my testimony on the direct case will be entirely contrary to that.

That is what I am—that is why I am trying to get him down to the rationale of why he did it.

JUDGE TRACY: All right.

BY MR. TAYLOR:

Q. Would it be correct to say, in any event, Mr. Bruder, that the Exhibit 3, which you have before you, was prepared from the books and records of Sloan & Co.?

MR. RASHES: I believe he has Exhibit 4, Mr. Taylor.

MR. TAYLOR: Is that 4?

MR. RASHES: Yes.

MR. TAYLOR: I beg your pardon, that is 4.

First time you are right today.

Q. Is that correct, sir, that these schedules that you ultimately finalized, were prepared from the books and records of Sloan?

A. Yes, sir.

In view of the above cross-examination and the cross-examination with respect to the computations of capital on all of the other dates cited in the decision of the S.E.C. plus the brief filed by Petitioner's counsel, it was absurd for the S.E.C. to suggest that Petitioner "does not challenge those findings" of violations of the S.E.C.'s net capital rule (See Pet. App. 26a). Moreover, assuming that Petitioner's counsel committed a procedural default under the Rules of Practice of the S.E.C., which is essentially what the S.E.C. contends, the Court of Appeals was still obliged by §25(a)(4) of the Securities Exchange Act to determine if the findings of fact were supported by

"substantial evidence" in the record irrespective of the S.E.C.'s procedural rules. If the "substantial evidence" test is applied, there is clearly insufficient evidence under any test to support the findings by the S.E.C.

Incidentally, in the direct examination of Bruder and Kanoff, no explanation was given or attempted of the method of computing net capital or the process by which they arrived at their computations. In the case of each computation, either Bruder or Kanoff was asked to state the bottom line figure at which he arrived and then the computation was received into evidence without further explanation or analysis. This placed the total burden on Petitioner's counsel to explore, through cross-examination, the method by which these computations were made as well as their accuracy. Judge Ward, in the trial before him of the S.E.C.'s parallel injunctive suit, permitted the S.E.C. the same latitude.

VII

In page 3, footnote 1 of the brief in opposition there is a direct quotation from two sentences of the decision of the S.E.C. These sentences state:

> "Sloan's own testimony shows that he engaged in the securities business . . . from January to July 28, 1971. And in January of 1972 he inserted quotations for various securities in the . . . quotation listings published by the National Quotation Bureau, Inc."

Petitioner's brief to the Court of Appeals in this case pointed out that neither sentence was supported by any testimony or evidence in the record. Significantly and characteristically, the brief in opposition does not cite any pages of the record where evidentiary support for these two sentences can be found nor could it do so, because, as a matter of fact, Petitioner never testified that he engaged in the securities business from January to July 28, 1971 and neither he nor the two S.E.C. in-

vestigators who testified at the hearing stated that he had inserted quotations in the pink sheets in January, 1972. Moreover, as the Petition (Pet. 44 and n. 6) points out, the question of whether Petitioner inserted quotations in the pink sheets in January, 1972 is more susceptible to documentary proof than to testimonial recollection. The only proper way to prove that Petitioner inserted quotations in the pink sheets in January, 1972 would be for the S.E.C. to produce a pink sheet containing a quotation submitted by Petitioner. The S.E.C. did not do so and an examination of the record leads reasonably to the conclusion that Petitioner in fact did not insert bid and asked quotations in the pink sheets in January, 1972. It is worth adding that the Order for Public Proceedings (Pet. App. 1a-4a) contains no allegation that Petitioner inserted quotations in the pink sheets in January, 1972 or at any other time.

Another thing which should be said about footnote 1 of the brief in opposition concerns the findings of the Administrative Law Judge which the S.E.C. said Petitioner "did not challenge." If one will look at Pet. App. 13a one will see two columns of figures. These show that the Administrative Law Judge did not make a precise determination of Petitioner's net capital on the various dates in question. Instead he set forth alternative figures for most of the dates and did not purport to decide which of the two sets of figures were correct. The S.E.C. itself, without any discussion of this situation, merely adopted the figure in the right hand column which was invariably the lower figure when the two columns differed (See Pet. App. 31a). The exception to this practice concerned the January 31, 1972 date where the right hand column of the Administrative Law Judge's figures did not set forth any net capital deficiency. This circumstance demonstrates that Petitioner did not receive notice of precisely what net capital violations were being alleged even as late as the time of his appeal to the S.E.C. from the decision of the Administrative Law Judge and that the S.E.C. staff itself is uncertain of how net capital is to be computed, a circumstance which has constitutional implications. See Pet. 4, Question 6.

The final thing which should be said about footnote 1 of the brief in opposition concerns the statement made in the decision of the S.E.C. that Petitioner "merely challenged the finding that he had engaged in business between the end of July and September, 1971 (Pet. App. 26a)." This statement regarding an argument Petitioner was making is misleading. An examination of the initial decision of the Administrative Law Judge reveals the absence of any finding that Petitioner was doing business at any time with the exception of a finding that "registerant engaged in new business in July, August and September, 1971." (Pet. App. 14a). Accordingly, Petitioner presented an argument in his appeal to the S.E.C. in accordance with numerous S.E.C. interpretative decisions which have stated that a "willful" violation of Rule 15c 3-1 occurs only when a broker dealer conducts a securities business while its aggregate indebtedness exceeds 2,000 per cent of its net capital. See e.g. *In the Matter of Superior Securities Co. Inc.*, Securities Exchange Act Release No. 34-7767, CCH Fed. Sec. Law Rep. ¶77,312 [1964-66 Transfer Binder]. See "Capital Deficiencies—Securities Transactions," CCH Fed. Sec. Law Rep. 25, 135 headnote.25 [Exchance Act Binder] which cites 57 decisions in which the S.E.C. has adhered to this holding. The rationale of this is that it is not a violation of any statute or rule for a broker-dealer to go broke but it is a violation of the S.E.C.'s net capital rule for a broker-dealer to do business when he has a "net capital deficiency" as defined by the rule. Accordingly, Petitioner understandably felt that he need merely refute the finding that he did business in July, August and September, 1971, which was the only finding in the initial decision that he did business at any time, to defeat the S.E.C. staff's allegation that he violated the net capital rule. However, the S.E.C. proceeded to rule that it was "unnecessary to reach" Petitioner's contentions (See Pet. 32a, n. 15) because it was making a finding not made by the Administrative Law Judge that Petitioner "engaged in the securities business . . . from January to July 28, 1971."

VIII

This again demonstrates the problem Petitioner faced due to the lack of notice. Although the Order for Public Proceedings recites statutory language by alleging that Petitioner "used the means and instrumentalities of interstate commerce to effect transactions" (Pet. App. 2a) it does not state what Petitioner did and when and where he did it. Although Petitioner filed a motion for a more definite statement, the Administrative Law Judge denied this motion with a ruling that "it is not necessary for the notice of proceedings to detail and itemize 'all the particular acts, which together constitute the offense' " (Pet. App. 6a). Thus, Petitioner was forced to proceed to the hearing without having the foggiest idea of what, for example, means and instrumentalities the S.E.C. staff was alleging that he had used. That still has not been clarified (See Pet. 5, 64). Petitioner did not have a concrete notion of what the charges were until the S.E.C. staff filed its "proposed findings of fact and conclusions of law," which was after the administrative hearing. Under the Rules of Practice of the S.E.C., the contentions of the S.E.C. staff were narrowed by the initial decision of the Administrative Law Judge to the extent that some of them were rejected (See Initial Decision Pet. App. 22a, n. 17). This is because the S.E.C. staff did not file a petition for review of the Administrative Law Judge's decision and under Rule 17(g) of the Rules of Practice the only questions before the S.E.C. concerned the objections filed by Petitioner. Specifically, Rule 17(g) states:

> "*Scope of review.* (1) Review by the Commission of an initial decision by a hearing officer shall be limited to the matters specified in the order for review. On notice to all parties, however, the Commission on review may raise and determine any other matters which it deems material, with opportunity for oral or written argument thereon by the parties.
>
> (2) On review the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial decision by the hearing officer and make any findings or conclusions which in its judgment are proper on the record."

Under this rule, the S.E.C. had no authority to make findings on matters not covered by the initial decision of the Administrative Law Judge without prior notice to all parties and the proposed findings of fact submitted by the S.E.C.'s staff prior to the initial decision no longer were issued due to the failure of the S.E.C. staff to seek review of the initial decision. Therefore, Petitioner filed a terse twelve-page brief which addressed itself solely to the findings made in the initial decision of the Administrative Law Judge. By making findings of fact based upon its own "independent review of the record," (Pet. App. 30a, n. 2) which included findings on matters not covered in the initial decision, the S.E.C. violated its own procedural rules as well as §15(b)(5) and §15(b)(7) of the Securities Exchange Act and the due process clause of the Fifth Amendment to the Constitution.

Here, it should be noted that the initial decision contained numerous generalities concerning the importance of the S.E.C. rules in question, as well as broad assertions that Petitioner had violated those S.E.C. rules, but set forth few specific or detailed facts. For example, the only sentence dealing with bookkeeping violations after January 25, 1971 stated (Pet. App. 11a-12a):

> "Subsequent visits to registrant's office by another Commission investigator in March, April, May, June and August, 1971 disclosed that the books and records were not in compliance and on at least one occasion were not available for inspection."

No further elaboration was given as to what these violations consisted of specifically. The decision of the S.E.C. subsequently found that violations of the S.E.C. bookkeeping rules had been observed during a visit by an S.E.C. investigator to Petitioner's office on February 25, 1971 (Pet. App. 25a). The initial decision

did not find that a visit had occured on that date or on any date in February, 1971. As the Petition notes (Pet. 68), it appears from material obtained subsequently under the Freedom of Information Act that the February 25, 1971 visit never took place.

The brief which the S.E.C. staff filed in response to Petitioner's appeal to the Commission never defended, by citing pages of the record, the specific fact findings in the initial decision by the Administrative Law Judge. Instead, it stated that "the Commission is respectfully referred to the Division's Findings and briefs submitted" (Record p. 1231). The term "Division" meant the "Division of Enforcement" of the New York Regional Office of the S.E.C. (See Pet. App. 9a). In its conclusion, the S.E.C. staff stated "the vast majority of the *Division's* allegations and findings remain unanswered and unrefuted." (emphasis added) (Record p. 1237). Note that this brief did not state that the findings of the Administrative Law Judge were unanswered and unrefuted. Rather, the S.E.C. staff requested the Commissioners to ignore what the Administrative Law Judge had said and rely on the Division's proposed findings of fact, a course which the S.E.C. ultimately took in part when it rendered a decision based upon "an independent review of the record" (Pet. App. 30a, n. 2) in clear violation of Rule 17(g) and the Administrative Procedure Act, 5 U.S.C. §556(d), which states that "sanctions may not be imposed . . . except on consideration of . . . those parts of the record cited by a party" (See Pet. 8). Except for the initial brief which was filed immediately after the administrative hearing, the S.E.C. has to this day never filed a brief which, by citing to pages of the record, showed where there was substantial evidence in the record supporting the decision sought to be reviewed. In other words, in its brief to the S.E.C. on review of the initial decision, the S.E.C. staff did not cite pages showing where there was evidence to support the findings of the Administrative Law Judge and likewise in its brief to the Court of Appeals the S.E.C. did not attempt to show where one could find the evidence supporting the findings of the S.E.C. Similarly, in the parallel case resulting in the decision reported

as *S.E.C. v. Sloan*, 369 F. Supp. 996 (S.D.N.Y. 1974), the S.E.C. declined to file a post-trial brief and instead preferred to rely on its proposed findings of fact submitted prior to the trial (which were a virtual carbon copy of the proposed findings of fact filed with the Administrative Law Judge with a bit of updated material) and in its brief to the Court of Appeals in response to the appeal of that decision, the S.E.C. again chose not to tell the judges where to look to find evidence supporting the decision. In *S.E.C. v. Commonwealth Securities, Inc.*, CCH Fed. Sec. Law Rep. ¶95,495 [1976 Binder], Judge MacMahon explained the problem presented when the S.E.C. proceeds in this manner:

> "The complaint in this action rambles for some thirty-four pages and alleges violations of ten statutes and six rules of the Securities and Exchange Commission ("SEC") by fifteen defendants. The presentation of the case upon the trial was confused, disjointed, unfocused, incoherent and, at times, incomprehensible. Nor were the post-trial briefs of any assistance whatever in marshalling the evidence and relating it to the legal contentions of the parties. This has placed an intolerable burden upon the limited time and resources of a busy trial judge in this congested district.
>
> "Criminal cases under the securities laws and mail fraud statutes, involving equally complex transactions, are routinely tried and disposed of in this court in a fraction of the effort and time devoted to this poorly presented case. Here, we have been put to the almost endless and certainly exhausting task of trying to bring order out of chaos. Nonetheless, we must deal with the issues of fact in light of the applicable law as best we can perceive them under the circumstances."

In the case presented here the S.E.C. has changed its tune at every step and there are significant differences between the arguments presented to this Court and the arguments which were presented to the Court of Appeals. (See e.g. Brief in Op-

position p. 6 point 2, last sentence). With regard to the initial decision, the S.E.C. staff must have known that it contained numerous errors. For example, the initial decision states (Pet. App. 14a) that on July 28, 1971 Petitioner agreed with the S.E.C. "to cease doing a retail business" and "to liquidate customer accounts" whereas, as the S.E.C. staff well knew, Petitioner never did a retail business and consequently had no customer accounts to liquidate and his entire business had never consisted of more than "personal business" which consisted of buying and selling securities for his own account. Had the Administrative Law Judge perceived this, as he should have been able to do from examining financial data put into evidence by the S.E.C., (see e.g. Record p. 501 which states "The stock record or stock proof maintained should be viewed in the light of the firm doing no customer business"), he might have made a different decision. More significant at the present late stage, the S.E.C.'s refusal ever to admit that glaring errors like this were made below is reprehensible. As Judge Haight recently stated in *United States v. Fields*, CCH Fed. Sec. Law Rep. ¶96,074 [Current Binder] (decided June 3, 1977), which dealt with the activities of Jeffrey Tucker and William Nortman, the two S.E.C. attorneys who acted in a supervisory capacity during the life of the instant case:

> "It is a sad irony that representatives of a governmental agency dedicated to the prevention of fraudulent and misleading statements fell into this particular pattern of behavior."

IX

Finally, the brief in opposition states that all of the other claims presented in the petition were "correctly rejected" by the Court of Appeals. However, certain claims presented in the petition to this Court were not presented to the Court of Appeals because it was impossible to do so. These claims concern memoranda and other documents from the files of the S.E.C.

which were released to Petitioner in April, 1977 by order of the S.E.C. pursuant to the Freedom of Information Act. These matters are discussed at Pet. 46, 65-68. Certain of the documents in question would clearly form a basis for reopening this proceeding before the S.E.C. based upon newly discovered evidence, fraud by an adverse party or related grounds since they state on their face that certain violations found in the decision of the S.E.C. did not occur, were it not for the fact that the S.E.C. has no procedure for reopening a proceeding based upon newly discovered evidence or any other ground for that matter. Indeed, the S.E.C. staff has filed a memorandum stating that the S.E.C. has no jurisdiction to reconsider this case. (See Pet. 69, n. 17). The brief in opposition does not dispute this point.

It is true that Petitioner made the same argument to the Court of Appeals but it was based on different, and less convincing, material which was released to Petitioner in 1976 shortly before the oral argument in that Court. This material was presented to the Court of Appeals in the form of a motion for "leave to adduce additional evidence" as authorized by §25(a)(5) of the Securities Exchange Act. The Court of Appeals took no action on this motion and its decision shows why it did not feel the need to do so because it states that each of the two injunctions obtained by the S.E.C. "was in itself a sufficient grounds to support the revocation of Sloan's broker-dealer license" (Pet. App. 41a). In so doing, the Court of Appeals held that questions concerning the evidence and the validity of the S.E.C.'s fact findings were irrelevant. If that erroneous determination is not reversed by this Court, then the door will be closed to any efforts Petitioner might undertake to obtain reconsideration based upon newly discovered evidence or other related grounds. This circumstance is further demonstrated by the fact that one of the two injunctions cited by the Court of Appeals, namely, the preliminary injunction dated January 17, 1975, had been vacated and the underlying case dismissed as moot before the Court of Appeals made its November 18, 1976 decision and the Court of Appeals clearly viewed this

development as being irrelevant. Thus, even if Petitioner were able to open the remaining January 18, 1974 injunction based upon newly discovered evidence or mootness, that would in no way affect the lifetime bar which now prevents Petitioner from ever being associated with any broker or dealer.

X

This again demonstrates the validity of one point which merits restating even though it was not discussed in the brief in opposition other than being one of many characterized as being "frivolous" (Brief in Opposition, p. 5), namely, the point concerning the constitutionality of the statute. Sections 15(b)(5) and 15(b)(7) of the Securities Exchange Act authorize a revocation and a bar, respectively, upon a showing that a respondent to an administrative proceeding has been "permanently or temporarily enjoined by order, judgment or decree of any court." Under the reading of this statute adopted by the Court of Appeals and supported by the brief in opposition, even a non-reviewable temporary restraining order or an injunction subsequently reversed on appeal or long since expired or vacated can "in itself form a sufficient basis for a broker dealer revocation." If this interpretation of the statute is correct, then the statute is clearly unconstitutional.

The only safeguards Congress provided to this interpretation of the statute lie in the requirement that there be (1) notice and the opportunity for a hearing and (2) a finding by the S.E.C. that the sanctions invoked are in the "public interest." As to the first of the two safeguards, the petition amply demonstrates and the brief in opposition admits that Petitioner did not receive notice and the opportunity to be heard with respect to all of the charges. As to the second, it is apparent that Congress did not set forth in the Securities Exchange Act any standards to guide the S.E.C. in its determination of what constitutes the "public interest" and this matter is not covered by S.E.C. rules or other statute or authority. The term "public interest" is itself

broad and vague and cannot be said to constitute any judicially cognizable standard. As the petition notes (Pet. 69), it is clear from numerous decisions of this Court that a delegation of authority by Congress to an administrative agency without standards is an unconstitutional delegation of legislative power. See e.g. *National Cable Television v. United States,* 415 U.S. 336, 342 (1974). Therefore, Securities Exchange Act §15(b)(5), §15(b)(7) and, for the same reason, §12(k), which covers the trading suspension aspects of this petition, are all unconstitutional.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition herein should be granted.

Respectfully submitted,

Samuel H. Sloan

Dated: New York, New York
September 21, 1977